No. 6165

United States
Circuit Court of Appeals
For the Ninth Circuit.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation,
Appellant,

vs.

BELVA FORREST and RONALD CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOSEPH A. BROWN and A. L. CRAWFORD, De Young Building, San Francisco, California,
Attorneys for Plaintiffs.

HARLEY F. PEART and GUS L. BARATY, Esqrs., 111 Sutter Street, San Francisco, California,
Attorneys for Defendants.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. ——.

Dept. No. ——.

BELVA FORREST and RONALD CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY, a Corporation, and RICHARD ROE CO., a Corporation,

Defendants.

COMPLAINT.

Plaintiffs complain of defendants and for cause of action allege:

I.

That the defendant herein, Indemnity Insurance Company of North America, is now and was at all of the times herein mentioned an insurance corporation duly formed, organized and existing under and by virtue of the laws of the State of Pennsylvania, and that said company is a duly qualified and existing insurance company lawfully and legally qualified to engage in the insurance business in the State of California, and doing business in the City and County of San Francisco, State of California, and having an office and principal place of business in the City and County of San Francisco, State of California.

II.

That John Doe Company is a duly and legally organized insurance company, duly existing by virtue of the laws of the State of California, a corporation organized thereunder and doing business therein, and entitled under the laws of the State of California to conduct business therein. [1*]

III.

That Richard Roe Company is herein sued under the fictitious name of Richard Roe Company because the true name of such defendant is unknown to plaintiffs, and plaintiffs ask that when such true

*Page-number appearing at the top of page of original certified Transcript of Record.

name is ascertained this complaint be amended by inserting such true name in lieu of such fictitious name.

IV.

That heretofore and during the year 1926 and prior to the 8th day of August, 1926, the defendants herein made, executed and delivered to one Mary C. Kittredge, also known as Mrs. E. H. Kittredge, their certain policy of insurance wherein and whereby, for a valuable consideration, the said defendants did insure the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge, in the sum and amount of Ten Thousand ($10,000.00) Dollars, as follows:

Under the terms of the aforesaid policy including additional insured:

"Sec. A. It is hereby understood and agreed, unless limited by enforcement attached hereto that this policy is extended to cover as additional assured any person or persons riding in or legally operating any automobile described in the declarations and any person, firm or corporation, legally responsible for the operation thereof (excepting always a public garage, automobile repair shop, and/or sales agency, and/or service station and agents and employees thereof), provided such use or occupation is with the permission of the named assured, or if the named assured is an individual with the permission of an adult member of the assureds household other than a chauffeur or domestic servant."

That the exclusions referred to are as follows:

"EXCLUSIONS."

"C. This policy shall not cover in respect of any automobile (1) while driven or manipulated in any race or speed test; (2) while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event; (3) while being used for towing or propelling any trailer or any vehicle used as a trailer. This Policy does not cover: (a) any liability of the Assured to any employe of the Assured while engaged in the maintenance or use of any automobile; (b) any liability voluntarily assumed by the assured; (c) any liability imposed by any Workmen's compensation law or agreement; (d) any loss under section C of this policy resulting from damage to or destruction of any tire due to [2] puncture, cut, gash, blowout or other ordinary tire trouble and excluding in any event damage to or destruction of tires unless caused by an accidental collision which also causes other damage to or destruction of the insured automobile."

V.

That said policy was in full force and effect on the 8th day of August, 1926, or thereabouts.

VI.

That the said automobile referred to and enumerated in said policy in special condition "A" was a certain Buick Sedan owned by the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge.

VII.

That in Superior Court action No. 12,406 a judg-

ment was recovered by the plaintiffs herein against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages on account of the death of the husband of the plaintiff, Belva Forrest, and the father of Ronald Claude Forrest, a minor, plaintiffs herein, as a result of the ownership and maintenance of the said Buick Automobile of the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge, on or about the 8th day of August, 1926.

VIII.

That on or about the 8th day of August, 1926, the aforesaid automobile of Mary C. Kittredge, also known as Mrs. E. H. Kittredge, was maintained, managed, and operated by one Roy Hooper, a chauffeur, while in the course of his employment as chauffeur by the said Mary C. Kittredge, also known as Mrs. E. H. Kittredge. That the said Roy Hooper was operating, managing, and maintaining the said Buick Automobile at the time of the injuries which caused the death of the said husband of plaintiff, Belva Forrest, and father of plaintiff, Ronald Claude Forrest, a minor. [3]

IX.

That said judgment is for the sum of Five Thousand Three Hundred and Twenty-four ($5,324.00) Dollars, principal sum, and Nine ($9.00) Dollars costs, and is dated the 22d day of March, 1928, that said judgment remains wholly unsatisfied and unpaid, and said judgment is final and has never been

vacated or set aside, and that the time for appeal has expired and that no motion for new trial is pending therein, and that no appeal has ever been taken therein.

X.

That in and by the said policy said defendants promised and agreed to pay any judgment obtained against the said Roy Hooper when the loss was made certain by judgment against the said assured after final termination of the litigation.

XI.

That said amount has been made certain by said judgment, as herein alleged, and the said litigation has finally terminated.

XII.

That an execution has issued against the property of the said Roy Hooper and has been returned wholly unsatisfied and *nulla bona.*

XIII.

That under and by virtue of said judgment, defendants herein are indebted to plaintiffs in the sum of Five Thousand Three Hundred and Thirty-three ($5,333.00) Dollars, and that neither the said sum nor any part thereof has been paid.

WHEREFORE, plaintiffs pray judgment against the defendants for the sum of Five Thousand Three Hundred and Thirty-three ($5,333.00) Dollars, for

legal interest from date of judgment, for costs herein, and for general and special relief.

JOSEPH A. BROWN,
S. L. CRAWFORD,
Attorneys for Plaintiffs. [4]

State of California,
County of Santa Clara,—ss.

Belva Forrest, being first duly sworn, deposes and says: That she is the plaintiff in the above-entitled action; that she has read the complaint therein and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters, she believes them to be true.

BELVA FORREST.

Subscribed and sworn to before me this 24 day of December, 1928.

[Seal] GEO. H. BENTLEY,
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: Filed Jan. 28, 1929. [5]

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 18,331—K.

BELVA FORREST and ROLAND CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY, a Corporation, and RICH ROE CO., a Corporation,

Defendants.

DEMURRER.

Comes now the defendant Indemnity Insurance Company of North America, a corporation, and demurs to the complaint of plaintiffs on file herein, and for grounds of demurrer specifies:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint is uncertain in this, it does not appear therein, nor can it be ascertained therefrom:

(a) Whether it is claimed or whether it be a fact that said Roy Hooper was operating said automobile "with the permission of the named assured," or "with the permission of an adult member of the assured's household."

(b) Who is the named assured in the alleged policy of insurance.

(c) Whether it is claimed that said Roy Hooper was the agent of the named insured and was operating said automobile as an agent of the insured or whether it is claimed that he, not acting as such agent, had been given permission to use said [6] automobile, or upon which of said theories plaintiffs are relying.

(d) Whether the alleged policy of insurance is now in full or any force or effect.

(e) Whether plaintiff Ronald Claude Forrest is the sole surviving child of said decedent.

(f) Whether any judgment was ever obtained against the named assured in the said policy.

III.

That said complaint is ambiguous for the reasons and in the particulars whereinabove it is alleged to be uncertain.

IV.

That said complaint is unintelligible for the reasons and in the particulars whereinabove it is alleged to be uncertain.

WHEREFORE defendant prays that this demurrer be sustained and that plaintiffs take nothing

by their said complaint, and that it be hence dismissed with its costs.

HARTLEY F. PEART,
Attorney for said Defendant.

HARTLEY F. PEART hereby certifies that he is the attorney for the defendant Indemnity Insurance Company of North America, a corporation, herein; that the foregoing demurrer is not filed for delay and is in his opinion well taken in point of law.

HARTLEY F. PEART. [7]

State of California,
City and County of San Francisco,—ss.

John D. Gallaher, being first duly sworn, deposes and says: That he is and was at all the times herein mentioned a citizen of the United States over the age of twenty-one (21) years, and an attorney employed in the office of Hartley F. Peart; that he served the above demurrer upon Joseph A. Brown, one of the attorneys of record for the plaintiff herein, by leaving a copy thereof at the office of the said Joseph A. Brown in Room 623 of the DeYoung Building, in the City and County of San Francisco, State of California, on the 27th day of February, 1929, between the hours of 10 and 11 A. M. of said day.

JOHN D. GALLAHER.

Subscribed and sworn to before me this 27 day of February, 1929.

[Seal] LOUISE BEARDEN,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within demurrer is hereby admitted this 27th day of February, 1929.

_____,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 27, 1929. [8]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of March, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 12, 1930—ORDER OVERRULING DEMURRER.

Ordered that the demurrer to the complaint heretofore argued and submitted, being now fully considered, be and the same is hereby overruled, with leave to answer within ten days. [9]

[Title of Court and Cause.]

ANSWER TO COMPLAINT.

Comes now the defendant Indemnity Insurance Company of North America, a corporation, and

answers to the complaint of plaintiffs on file herein, and by way of defense thereto admits, denies and alleges, as follows:

I.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of paragraph VII of said complaint, wherein it is alleged that in Superior Court action No. 12,406 a judgment was recovered by the plaintiffs herein against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages on account of the death of the husband of the plaintiff, Belva Forrest, and the father of Roland Claude Forrest, a minor, plaintiffs herein, and therefore and placing its denial upon that ground denies that in Superior Court action No. 12,406 or in any court or in any action a judgment was recovered by the plaintiffs or either thereof against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages or otherwise and/or on account of the death of the husband of the plaintiff Belva Forrest and/or the father of Roland Claude Forrest, a minor, [10] the plaintiffs herein and/or either thereof. Defendant denies that any judgment was ever recovered as a result of the or any ownership and/or maintenance of the said or any Buick or other automobile of said Mary C. Kittredge, and/or also known as Mrs. E. H. Kittredge on or about the 8th day of August, 1926, or at any other time or ever or at all.

II.

Defendant denies that on or about the 8th day of August, 1926, or at any other time or at all, the aforesaid automobile or any automobile of Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge, was maintained and/or managed and/or operated by one Roy Hooper, a chauffeur or otherwise, while in the course of his or any employment as chauffeur or otherwise or at all by the said Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of Paragraph VIII of said complaint, wherein it is alleged that the said Roy Hooper was operating, managing and maintaining the said Buick automobile at the time of the injuries which caused the death of the said husband of plaintiff Belva Forrest and father of plaintiff, Roland Claude Forrest, a minor, and therefore and placing its denial upon that ground denies that the said Roy Hooper was operating and/or managing and/or maintaining the said Buick or any automobile at the time of the injuries or any time or any injury which caused the death of the said husband of plaintiff Belva Forrest and/or father of plaintiff Roland Claude Forrest, a minor, and/or either thereof.

III.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IX of said complaint [11] wherein it is alleged that said

judgment is for the sum of Five Thousand Three Hundred Twenty-four (5,324.00) Dollars, the principal sum, and Nine (9.00) Dollars, costs, and is dated the 22d day of March, 1928; that said judgment remains wholly unsatisfied and unpaid, and said judgment is final and has never been vacated, or set aside, and that the time for appeal has expired and that no motion for a new trial is pending therein, and that no appeal has ever been taken therein, and therefore and placing its denial upon that ground denies that said judgment is for the sum of Five Thousand Three Hundred Twenty-four (5,324.00) Dollars or any part thereof or any sum whatever, the principal sum or otherwise, and/or Nine (9.00) Dollars or any sum at all, costs, and/or is dated the 22d day of March, 1928, or any other time, and/or that said or any judgment remains wholly or at all unsatisfied and/or unpaid, and/or said or any judgment is final and/or has never been vacated, or set aside, and/or that the time or any time for appeal has expired and/or that no motion for a new trial is pending therein, and/or that no appeal has ever been taken therein.

IV.

Defendant denies that in and/or by said or any policy this defendant promised and/or agreed to pay any judgment obtained against the said Roy Hooper when the loss was made certain by judgment against the said assured after final termination of the litigation and/or otherwise or at all and denies that said Roy Hooper was an assured of this defendant.

V.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XI of said complaint wherein it is alleged that said amount has been made certain [12] by said judgment as herein alleged and the said litigation has finally terminated, and therefore and placing its denial upon that ground denies that said or any amount has been made certain by said judgment or otherwise as herein in said complaint alleged or otherwise or at all, and/or that said or any litigation has finally or otherwise terminated.

VI.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XII of said complaint and therefore and placing its denial upon that ground denies that an execution has issued against the property of the said Roy Hooper and/or has been returned wholly or at all unsatisfied and/or *nulla bona* or otherwise or at all.

VII.

Defendant denies that under and/or by virtue of said or any judgment or otherwise or at all this defendant is indebted to plaintiffs or either thereof in the sum of Five Thousand Three Hundred Thirty-three (5,333.00) Dollars, or any part thereof, or any sum whatsoever.

WHEREFORE defendant prays judgment that plaintiffs take nothing by their said complaint and

that it be hence dismissed with its costs, and for such other and further relief as to the Court may seem meet and proper.

HARTLEY F. PEART,
Attorney for said Defendant. [13]

State of California,
City and County of San Francisco,—ss.

R. W. Forsyth, being first duly sworn, deposes and says: My name is R. W. Forsyth; I am an officer, to wit, Pacific Coast Manager of the Indemnity Insurance Company of North America, a corporation, one of the defendants herein, and as such am authorized to and do make this affidavit for and on behalf of said defendant; that I have read the foregoing answer, know the contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters I believe it to be true.

R. W. FORSYTH.

Subscribed and sworn to before me this 25th day of July, 1929.

[Sea] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within answer is hereby admitted this 25th day of July, 1929.

JOSEPH A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 25, 1929. [14]

[Title of Court and Cause.]

AMENDED ANSWER TO COMPLAINT.

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and files this its amended answer to the complaint of plaintiffs on file herein, and by way of defense thereto admits, denies and alleges as follows:

I.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of Paragraph VII of said complaint, wherein it is alleged that in Superior Court action No. 12,406 a judgment was recovered by the plaintiffs herein against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages on account of the death of the husband of the plaintiff, Belva Forrest, and the father of Roland Claude Forrest, a minor, plaintiffs herein, and therefore and placing its denial upon that ground denies that in Superior Court action No. 12,406 or in any court or in any action a judgment was recovered by the plaintiffs or either thereof against one Roy Hooper by reason of the liability imposed by law upon the said Roy Hooper for damages or otherwise and/or on account of the death of the husband of the plaintiff, Belva Forrest, and/or the [15] father of Roland Claude Forrest, a minor, the plaintiffs herein and/or either thereof. Defendant denies

that any judgment was ever recovered as a result of the or any ownership and/or maintenance of the said or any Buick or other automobile of said Mary C. Kittredge on or about the 8th day of August, 1926, or at any other time or ever or at all.

II.

Defendant denies that on or about the 8th day of August, 1926, or at any other time or at all, the aforesaid automobile or any automobile of Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge, was maintained and/or managed and/or operated by one Roy Hooper, a chauffeur or otherwise, while in the course of his or any employment as chauffeur or otherwise or at all by the said Mary C. Kittredge and/or also known as Mrs. E. H. Kittredge. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer that portion of Paragraph VIII of said complaint, wherein it is alleged that the said Roy Hooper was operating, managing and maintaining the said Buick automobile at the time of the injuries which caused the death of the said husband of plaintiff, Belva Forrest, and father of plaintiff, Roland Claude Forrest, a minor, and therefore and placing its denial upon that ground denies that the said Roy Hooper was operating and/or managing and/or maintaining the said Buick or any automobile at the time of the injuries or any time or any injury which caused the death of the said husband of plaintiff, Belva Forrest, and/or father of plaintiff, Roland Claude Forrest, a minor, and/or either thereof.

III.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IX of said complaint wherein it is alleged that said judgment is for the sum of Five Thousand Three Hundred [16] Twenty-four (5,324.00) Dollars, the principal sum, and Nine (9.00) Dollars, costs, and is dated the 22d day of March, 1928; that said judgment remains wholly unsatisfied and unpaid, and said judgment is final and has never been vacated or set aside, and that the time for appeal has expired and that no motion for a new trial is pending therein, and that no appeal has ever been taken therein, and therefore and placing its denial upon that ground denies that said judgment is for the sum of Five Thousand Three Hundred Twenty-four (5,324.00) Dollars or any part thereof, or any sum whatever, the principal sum or otherwise, and/or Nine (9.00) Dollars or any sum at all, costs, and/or is dated the 22d day of March, 1928, or any other time, and/or that said or any judgment remains wholly or at all unsatisfied and/or unpaid, and/or said or any judgment is final and/or has never been vacated, or set aside, and/or that the time or any time for appeal has expired and/or that no motion for a new trial is pending therein, and/or that no appeal has ever been taken therein.

IV.

Defendant denies that in and/or by said or any policy this defendant promised and/or agreed to

pay any judgment obtained against the said Roy Hooper when the loss was made certain by judgment against the said assured after final termination of the litigation and/or otherwise or at all and denies that said Roy Hooper was an assured of this defendant.

V.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XI of said complaint wherein it is alleged that said amount has been made certain by said judgment as herein alleged and the said litigation has finally terminated, and therefore and placing its denial upon that ground denies that said or any amount has been made certain by said judgment or otherwise as herein in said [17] complaint alleged or otherwise or at all, and/or that said or any litigation has finally or otherwise terminated.

VI.

Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XII of said complaint, and therefore and placing its denial upon that ground denies that an execution has issued against the property of the said Roy Hooper and/or has been returned wholly or at all unsatisfied and/or *nulla bona* or otherwise or at all.

VII.

Defendant denies that under and/or by virtue

of said or any judgment or otherwise or at all this defendant is indebted to plaintiffs or either thereof in the sum of Five Thousand Three Hundred Thirty-three (5,333.00) Dollars or any part thereof or any sum whatsoever.

As and for a second, further, separate, distinct answer and defense defendant alleges as follows:

I.

That under and by the terms of the policy of insurance set forth and referred to in plaintiffs' complaint, it was provided as follows:

> In the event of accident, the assured shall give prompt written notice thereof to the company or to one of its duly authorized agents, and (1) forward to the company forthwith after receipt thereof every process, pleading or paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the company all co-operation and assistance in his power and, whenever requested, shall aid in securing information and evidence and the attendance of witnesses, and in prosecuting appeals. The assured shall make no settlement of any claim arising hereunder nor incur any expense other than for immediate surgical relief without the written consent of the company. The company shall have the right to settle any claim or suit at its own cost at any time. [18]

That the said Roy Hooper mentioned and referred to in plaintiffs' said complaint did not for-

ward to this defendant forthwith after receipt thereof any process or pleading or paper relating to any or all claims or suits or proceedings but on the contrary the said Roy Hooper wholly failed and neglected to forward to this defendant any process or pleading or paper of any kind relating to said accident or suit or claim or proceeding, and wholly failed and neglected to forward to this company any copy of summons or complaint or to give this defendant any notice of any service upon him of any summons or complaint in that certain action set forth and referred to in plaintiffs' complaint wherein the said Roy Hooper was defendant, nor did the said Roy Hooper ever give to this defendant any notice that any judgment was obtained against him in the said action or in any action, and as defendant is informed and believes and upon its information and belief alleges the fact to be that the said Roy Hooper did suffer a default judgment to be entered in the said action against him without giving any notice thereof or of the service of any summons or complaint upon him therein to this defendant.

That the said alleged assured did not at all times or any time or times, or at all render to this defendant all co-operation and assistance in his power or any co-operation or assistance whatsoever as required under and by the terms of said policy as aforesaid.

II.

That defendant is informed and upon its information and belief alleges the fact to be that the

said Roy Hooper had a good, meritorious and sufficient defense to that certain suit or action set forth and referred to in plaintiffs' complaint and if the said Hooper had notified this defendant of the fact that any summons or complaint therein had been served upon him, or had given or forwarded to this defendant a copy of any summons or complaint [19] so served upon him in said action, or had rendered co-operation or assistance to this defendant, all as required by the said policy of insurance as aforesaid, this defendant could and would have presented the said defense of the said Hooper in said action.

III.

That by reason of the premises and the said failure and neglect of the said Roy Hooper as aforesaid, this defendant was prevented from entering any defense in said action on the part of the said Hooper and was and is greatly prejudiced in its rights under the terms of the said policy of insurance.

WHEREFORE, defendant prays judgment that plaintiffs take nothing by their said complaint and that it be hence dismissed with its costs, and for such other and further relief as to the Court may seem meet and proper.

HARTLEY F. PEART,
Attorney for Said Defendant. [20]

State of California,
City and County of San Francisco,—ss.

R. W. Forsyth, being first duly sworn, deposes and says: My name is R. W. Forsyth; I am an officer, to wit, Pacific Coast Manager of the Indemnity Insurance Company of North America, a corporation, one of the defendants herein, and as such am authorized to and do make this affidavit for and on behalf of said defendant; that I have read the foregoing answer, know the contents thereof, and that the same is true of my own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters I believe it to be true.

R. W. FORSYTH.

Subscribed and sworn to before me this 11th day of February, 1929.

[Seal] DAISY CROTHERS WILSON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 13, 1930. [21]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 11th day of February, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 11, 1930—TRIAL.

This case came on regularly this day for trial, Joseph A. Brown, Esq., appearing as attorney for plaintiff, and Hartley F. Peart, Esq., appearing as attorney for defendant. Thereupon the following named persons, to wit:

* * * * * * * * * * *

twelve good and lawful jurors, were, after examination under oath, duly accepted and sworn to try the issues joined herein. Counsel for defendant moved the Court for leave to file an amendment to the answer herein, and plaintiff objecting thereto, ordered motion denied and exception entered. Counsel made opening statement as to the nature of the case to the Court and jury. Eugene F. Cerqui was sworn and testified on behalf of plaintiff and introduced in evidence an exhibit, which was filed and marked "A." Thereupon the jury was excluded from the courtroom, and defendant moved for an order and judgment of nonsuit, and after arguments of counsel, motion was ordered denied and exception entered. Whereupon the jury returned into court, and the trial was resumed. Robert W. Forsythe and G. R. N. Browne were sworn and testified in behalf of defendant. Defendant introduced in evidence an exhibit, which was filed and marked "B." Another exhibit was filed and marked for identification. A. L. Crawford was sworn and testified on behalf

of plaintiff in rebuttal. The Court, after admonishing the jury, ordered the further trial of this case continued to February 13, 1930, at 10 A. M. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 13th day of February, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 13, 1930—TRIAL (RESUMED).

The parties being present as heretofore, the trial of this case was this day resumed. Joseph Bargas, E. E. Creswell and Mrs. Belva Forrest Dovan were sworn and testified on behalf of defendant and defendant rested. A. L. Crawford was recalled and further testified on behalf of plaintiff, and thereupon plaintiff rested. Defendant then moved the Court for an order discharging the jury, which motion the Court ordered denied and an exception entered. The defendant then moved for a directed verdict in its favor, which motion the Court ordered denied and exception entered. After hearing counsel for defendant, further ordered that the motion of defendant for leave to file amended answer to com-

plaint be and the same is hereby granted. After argument by counsel and instructions of the Court to the jury, the jury retired at 12:10 P. M. to deliberate upon a verdict and returned into court at 12:25 P. M., and upon being asked if they had agreed upon a verdict answered in the affirmative, and presented a written verdict, which was ordered filed and recorded, viz.: "We, the jury in the above-entitled matter, find a verdict in favor of plaintiffs, Belva Forrest and Ronald Claude Forrest, a minor, and against the defendant, Indemnity Insurance Company of North America a corporation, for the sum of Five Thousand Three Hundred Thirty-four Dollars ($5,334.00), together with interest on said sum from the 3d day of May, 1928. Dated: February 13, 1930. John T. Roberts Foreman." Thereupon the Court ordered that judgment be entered in accordance with said verdict and that the jury hereby be and is discharged from further consideration of the case. On motion of counsel for defendant, it is ordered that the execution of said judgment be and is hereby stayed for a period of thirty days. [23]

[Title of Court and Cause.]

BILL OF EXCEPTIONS PROPOSED BY DEFENDANT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

BE IT REMEMBERED, that on the 11th day of February, 1930, the above-entitled action came on

regularly for trial before the above-entitled court and a jury, the Honorable Frank H. Kerrigan, presiding, the plaintiffs being represented by A. L. Crawford, Esq., and Joseph A. Brown, Esq., and the defendant, Indemnity Insurance Company of North America, a corporation, being represented by Hartley F. Peart, Esq., and Gus L. Baraty, Esq.; and the following proceedings were had, orders made, objections interposed, rulings made by the Court, and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing, had and taken thereon, the following being all of the testimony and evidence offered or introduced on the trial of this cause:

Mr. BARATY.—I now move the Court for permission to file an amended answer on behalf of the defendant.

Mr. BROWN.—This is the first time I have ever heard of this amendment, and we object thereto.

The COURT.—The motion coming as late as it does, it is [24] denied, and an exception noted.

Mr. BROWN.—It is going to be stipulated, your Honor, between counsel, that Belva Forrest and Donald Claude Forrest, a minor child, are the sole heirs of the decedent, and the plaintiffs in this case, and were the plaintiffs in the action brought against Roy Hooper.

Mr. BARATY.—It is so stipulated.

TESTIMONY OF EUGENE F. CERQUI, FOR PLAINTIFFS.

EUGENE F. CERQUI, called as a witness for the plaintiffs, being duly sworn, testified as follows:

Direct Examination.

I am Deputy County Clerk of San Mateo County. I have with me the records in the case of Belva Forrest and Donald Claude Forrest, a minor, by his guardian *ad litem,* against Roy Hooper, et al.

Mr. BROWN.—I would like counsel to stipulate that on the 5th day of May, 1928, a judgment was rendered in the Superior Court of the State of California, in and for the County of San Mateo, in action number 12,406, versus Roy Hooper, for the principal sum of Five Thousand Three Hundred and Twenty-four Dollars ($5,324.00) and Nine Dollars ($9.00) costs, and that execution issued out of the Superior Court of San Mateo County on the 1st day of November, 1928, directed to the Sheriff of the County of San Mateo, and that the Sheriff of the County of San Mateo under his certificate, dated November 15, 1928, duly returned as follows:

> "I, James J. McGrath, Sheriff of the County of San Mateo, do hereby certify that in and by virtue of the within and hereunto annexed writ of execution by me received on the fifth day of November, 1928, I made due search for

(Testimony of Eugene F. Cerqui.)

property upon which I could levy and satisfy said writ and judgment, and I am unable to find any property belonging to the [25] defendant herein named in said City and County, and I herewith return said writ unsatisfied."

Dated Redwood City, the 15th day of November, 1928, and signed James J. McGrath, by E. W. Gallacher, Deputy.

Mr. BROWN.—Will you so stipulate?

Mr. BARATY.—Yes. And, Mr. Brown, let the records show that this execution was issued against the defendant, Roy Hooper, alone.

Mr. BROWN.—Certainly, Roy Hooper alone.

Mr. BARATY.—Yes.

Cross-examination.

Mr. BARATY.—As my cross-examination, I will ask you, Mr. Brown, for a stipulation concerning the remainder of the record.

Will you stipulate, Mr. Brown, that the complaint in the action referred to, that is, number 12,406, in San Mateo County, was filed with the Clerk of the Superior Court of that County on the 13th day of October, 1926, and naming as plaintiffs the plaintiffs who are in this action here, and as defendants Roy Hooper, Mrs. E. H. Kittredge, First Doe and Second Doe, and then there is a change made in the name of Mrs. E. H. Kittredge, naming in her stead Walter Perry Johnson, as executor of the estate of Mary C. Kittredge, deceased—

(Testimony of Eugene F. Cerqui.)

will you stipulate that that complaint was filed on that day?

Mr. BROWN.—Yes, sir.

Mr. BARATY.—Will you also stipulate that on the 11th day of February, 1927, the Superior Court of San Mateo County made an order dismissing the case as far as it concerned Walter Perry Johnson as executor of the estate of Mrs. Mary E. Kittredge, sometimes known as Mrs. E. H. Kittredge, deceased?

Mr. BROWN.—Isn't that immaterial to this case? I will stipulate that it was entered against Roy Hooper alone, because Mrs. Kittredge died, and they could not proceed against her. [26]

Mr. BARATY.—Will you stipulate, Mr. Brown, that a copy of the summons and complaint in that action pending in San Mateo County was served on Roy Hooper in Kern County, this State, on the 28th day of March, 1927?

Mr. BROWN.—We will so stipulate.

Mr. BARATY.—Will you stipulate that a request for the default of Roy Hooper was made by yourself and your associates in the Superior Court of San Mateo County on the 2d day of March, 1928?

Mr. BROWN.—We object to that as incompetent, irrelevant and immaterial and without the issues of the case. We will stipulate to that, your Honor, but we object to it as immaterial, on the grounds that it is immaterial.

The COURT.—Objection overruled; exception.

DEPOSITION OF ROY HOOPER, FOR PLAINTIFFS.

Direct Examination.

The testimony of the witness ROY HOOPER was all received by and through a deposition duly taken by plaintiffs on October 15, 1929.

I reside at Glendale. On August 9th, 1926, I was employed by Mrs. E. H. Kittredge, of Saratoga, as chauffeur. I had been so employed by her continuously since April, 1926, at a monthly salary of $140.00; my employment was discontinued August 11, 1926; I drove a 1926 Master Six Buick Sedan that belonged to Mrs. E. H. Kittredge; I had driven it continuously from the time I entered her employment; I had an accident with this automobile on August 9, 1926, at about 2:30 A. M. at Atherton, when I struck Claude Forrest, the father of this child, and husband of this widow.

There was a license or registry tag in the automobile that showed who the owner of it was and that showed the owner to be [27] Mrs. E. H. Kittredge, as the legal owner of the car. (It was stipulated that Claude E. Forrest was so struck and that he was the father of the child and the husband of this widow in this action.) The car I was driving when I struck the said Claude E. Forrest at Atherton was the Buick Sedan of Mrs. Kittredge of Saratoga, California, and that (it was stipulated that it was the same car and the same employer as the one in question and that it is

(Deposition of Roy Hooper.)

the same Mrs. E. H. Kittredge covered by the policy of insurance introduced in evidence in this case). Mrs. Kittredge was my employer and was the one who employed me to drive the Buick Sedan, and who was paying me the $140.00 for driving the car; the conversation had with her was approximately at 4:30 in the afternoon at her place in Saratoga, and I believe the nurse was present at that conversation; I do not know the name of the nurse when the nurse handed me the package with instructions to deliver it, Mrs. Kittredge was sitting in the library adjoining the living-room; I told Mrs. Kittredge I would return early in the evening before twelve o'clock, if possible; I said I was going to a theater in San Francisco afterwards; I asked her permission to take the Buick Sedan, and thereupon I took the Buick Sedan and went to San Francisco under those conditions; I left San Francisco around twelve o'clock; at the time of the accident I was going south on the State Highway somewhere in the vicinity of Atherton at the time I struck this man, Claude Estell Forrest, and found out afterwards at the hospital in Palo Alto that he was dead.

I saw Mrs. E. H. Kittredge on August 8, 1926, at about 4:30 in the afternoon at her ranch at Saratoga. I had a conversation with her in regard to coming to the city. I think the nurse was present, but I do not remember her name.

Q. State what Mrs. Kittredge there said to you.

Mr. BARATY.—We object as incompetent, ir-

relevant and immaterial [28] and calling for hearsay testimony.

Mr. BARATY.—There is legal situation presented here, your Honor, that has not been established by proof. But Mrs. Kittredge is deceased—died a few months after this accident, and I feel that the fact of her death may put a different complexion on the hearsay testimony that is going to be elicited in this case. Of course, we are in this situation: The defendant also has some hearsay testimony coming from the same source as the plaintiffs. I think it is admissible, and I am rather inclined to think that the plaintiffs' testimony would be admissible, too, by reason of this death, and with that statement, I want to withdraw my objection last made, and ask your Honor to withdraw your ruling and permit the answer to stand. I will withdraw that objection.

Mr. BROWN.—Of course, I am not conceding to any hearsay testimony, *to any hearsay testimony* from Mr. Baraty. I think, if the Court please, the testimony is not hearsay in this sense; Mrs Kittredge is their insured; Roy Hooper is her employee and they are insured, because the conversations with Mrs. Kittredge, both of these being the assured of this company, they are parties before this Court. In a sense the conversations with her, with other people than Roy Hooper, would not be admissible, because we will not be bound by them; but these things are in a different state. The fact of her death, I do not think, makes any difference. Irrespective of the question of her death, I know

(Deposition of Roy Hooper.)

of no principle of law that renders testimony otherwise inadmissible admissible because of the death of the person. The question immediately before your Honor now is not as to conversations. Your Honor will see by referring to line 13, page 18, that it is describing an occurrence.

Mr. BARATY.—In view of Mr. Brown's statement now, I will insist upon the objection.

The COURT.—Objection sustained. [29]

Q. What did she say to you?

A. I asked her permission to go to the city Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse—whether it was Mrs. Kittredge's package being sent there or not,—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse.

Mr. BARATY.—I move to strike out the answer as not responsive.

Mr. BROWN.—It is too late to do that now. There has been no objection.

The COURT.—Does the stipulation provide that objections can be taken at the time?

Mr. BARATY.—It was taken by stipulation dictated by Mr. Brown.

Mr. BROWN.—There is no reservation of that kind at all.

Mr. BARATY.—But depositions are taken with reservations.

(Deposition of Roy Hooper.)

Mr. BROWN.—I do not think he can move to strike out the answer at this time, just because of the form of the question.

The COURT.—I will overrule the objection.

WITNESS.—(Continuing.) I told Mrs. Kittredge that I would be back early in the evening, before twelve, if possible, and I said I was going to the theater in San Francisco, and asked her permission to take the Buick Sedan. I drove to San Francisco, and left there about twelve.

Cross-examination.

I was employed by Mrs. Kittredge April 25, 1926, as chauffeur to drive her wherever she wanted to go.

Q. Now, on the 8th day of August, 1926, you say you had a conversation with Mrs. Kittredge at her residence?

A. Yes, I asked her permission to go to the city, and I asked her [30] if I could be released, and if she wanted me for anything else?

Q. Was she a well woman at that time or was she sick?

A. She hadn't been in good health ever since I had been in her employ.

WITNESS.—(Continuing.) Mrs. Kittredge had a Buick Sedan and a Ford Roadster; it was my business to drive the Buick, but not the Ford; on the 8th day of August, 1926, I had a conversation with Mrs. Kittredge at her residence; I asked her permission to go to the city and asked her if I could

(Deposition of Roy Hooper.)

be released and if she wanted me for anything else; it was in the living-room at her house on the ground floor; on that Saturday afternoon I asked her if she *need* me any more for the rest of the day and she said "No"; I asked, "May I go to the city?" and she said "Yes." Previously to that I turned and asked her if it was quite all right to use the Buick and she said, "Yes, but be careful"; then I dressed myself and got into the car and left the ranch for San Francisco. The nurse gave me the package, and I delivered it—whether it was Mrs. Kittredge's or the nurse's friend, I don't know that—they had so many friends, I didn't know one from the other, as far as their names were concerned. I don't know the name of the nurse. The first time I ever saw her was when I came to work there. I don't know her first name; I never heard her called by name. The package the nurse gave me was about six inches long and an inch and a half wide. It was wrapped in regular department store wrapping papers. The nurse was always with Mrs. Kittredge, because Mrs. Kittredge could not see very well. The nurse told me to deliver the package to the Fairmont Hotel, to the address on the package. I don't know the name; I didn't know what was inside the package; I was not told; Mrs. Kittredge did not say what was inside the package.

Q. On this occasion, did Mrs. Kittredge ask you to deliver this package to the Fairmont? [31]

A. It was handed to me by the nurse, and I pre-

(Deposition of Roy Hooper.)

sume the nurse was told by Mrs. Kittredge to do so—Mrs. Kittredge did not tell me.

Q. Mrs. Kittredge did not tell you anything in reference to that package?

A. No. Mrs. Kittredge did not ask me to deliver the package to the Fairmont. Nurse generally gave me all the stuff when it was to be delivered and anything to be taken any place—Mrs. Kittredge left that all to the nurse to take care of. The package was wrapped in regular department store wrapping paper; the nurse gave me the package standing in the living-room door in front part of the house, entering the front yard; the nurse was in the same room with Mrs. Kittredge; she was always with Mrs. Kittredge because she—Mrs. Kittredge—couldn't see very well; the nurse told me to "deliver the package to the Fairmont Hotel, if you will, please." I told Mrs. Kittredge that I would like to go to San Francisco to the theater. I went there because that is where Mrs. Kittredge always kept her car when she was in the city and also when she was at the Stanford Apartments on California Street, and she did all her trading there; my purpose in taking the car there was to leave the car there for the evening. The storage for the car that evening went on Mrs. Kittredge's bill. I did not pay for that.

Q. When you spoke to Mrs. Kittredge, you asked her if you couldn't be released for the day?

A. Yes.

(Deposition of Roy Hooper.)

Q. You told her you were coming to San Francisco?

A. I asked her if I could come to San Francisco.

WITNESS.—(Continuing.) I left the ranch about five o'clock and came direct to San Francisco, arriving about quarter to seven at the Abby Garage, on [32] O'Farrell Street, between Jones and Leavenworth. This was the place Mrs. Kittredge always kept her car. I took the car there and left it for the evening. Then I had dinner and went to Loew Warfield theater alone. I left the show about 11:15; I went to the Abbey Garage, I left the garage, in the machine, and returned to Saratoga, and on the way back, had the accident.

Q. What did you do with this package that the nurse had given you?

A. Delivered it to the Fairmont Hotel.

Q. When? A. That evening.

Q. When about, on the evening?

A. About—I don't know the exact time that I delivered it there.

Q. You haven't any idea what time that evening you delivered the package to the Fairmont Hotel?

A. No.

A. I went up there and turned and came right away from there.

Q. You drove up to the Fairmont Hotel?

A. I got to the city and I went straight up Van Ness to California and over California to Mason and drove in front of the Fairmont and parked and

(Deposition of Roy Hooper.)

delivered the package to the bell-hop and it was delivered by the bell-hop.

Q. You didn't deliver it to the desk clerk?

A. No, hop was standing outside and they usually pick stuff up outside.

Q. You don't know to whom the package was to be delivered?

A. Paid no attention to the name on the package.

Q. Took no receipt for it? A. No.

Q. Didn't know what was in it?

A. No. The first place I went to when I got back to Saratoga was to Joe Bargass' place; he was the foreman for Mrs. Kittredge; he occupied a home separate from the ranch about a mile away. I arrived there about 7:30 or close to 8:00 o'clock in the morning. I stayed at Joe Bargass' place possible one-half hour. [33]

Q. Did you have a conversation with Bargass that morning? A. Told him what happened.

Q. Tell him how the accident happened?

A. Yes.

Q. Do you recall having had a conversation with Mr. Bargass the morning of the accident, between 6:30 and 8:30, at his residence, in which he was present, and in which you were present, and in which you told him about the accident, and at which time you told him you had taken this automobile of Mrs. Kittredge's to San Francisco without her knowledge and consent or permission?

A. No.

(Deposition of Roy Hooper.)

Q. You didn't have any such conversation or made no such statement to Mr. Bargass? A. No.

Q. Do you recall having had a conversation with Bargass at that time and place in which you related of the accident and in which he told you at that time "That's what you get for not having the permission of Mrs. Kittredge to take her car"?

A. No.

Q. You had no such conversation? A. No.

Q. Mr. Hooper, I am going to show you a document—two pages—written on each side of each page, in ink, and dated "Palo Alto, Calif. August 9, 1926," and at the end appears the name "Roy Hooper" and also "Witness: G. R. A. Brown, Jr." —and I will ask you just to examine the document and tell us whether you ever saw that before.

Mr. BROWN.—Let the record show it is on two separate pieces of paper which are not fastened together except with a temporary clip and the signature only appears on the last page, and that it is not in Mr. Hooper's handwriting—any of it—except the signature.

Mr. BARATY.—That's the question I am asking him.

Mr. BROWN.—Shows it isn't his handwriting. [34]

Mr. BARATY.—No, isn't his handwriting, except*ion* the signature.

(Witness handed letter, examining same for some few minutes.)

A. Whoever wrote this letter can sure slip over a

(Deposition of Roy Hooper.)

lot of fake stuff. I don't know anything about that part (witness continuing to examine).

(Question read by the reporter.)

Mr. BARATY.—Did you ever see this document that you have just read over—these two pages, ever see that before? A. I never read it before.

Q. You never read it before? A. No.

Q. Have you ever seen it before?

A. I can't recall that now.

Q. You can't recall that? A. No.

Q. What is your best memory on it?

A. I was there with a man in Palo Alto.

Q. You mean you were there with G. R. A. Brown, Jr., at Palo Alto on that day?

A. I don't know what his name was and I don't know anything about it.

Q. Don't you know the man's name?

A. Don't know anything about him—as far as his name is concerned—I don't know his name at all.

Q. Mr. Hooper, the name "Roy Hooper" at the end of that document, is that or is not that your signature? A. My signature all right.

Mr. BARATY.—We will offer this document to be marked as exhibit for the purpose of identification and offer it in evidence on my cross-examination. And this document is the document that was marked by the notary, and that is the offer we make now.

(Thereupon the document was marked by the notary.)

(Thereupon the document was received in evidence and marked Defendant's Exhibit "A.") [35]

Defendant's said Exhibit "A" is in the words and figures following:

DEFENDANT'S EXHIBIT "A."

"Palo Alto, Calif.
August 9, 1926.

My name is Roy Hooper, my address is care of Mrs. Mary C. Kittredge, Saratoga, California.

On the afternoon of August 7, this year, I asked permission of my employer, Mrs. Mary C. Kittredge, for relief from work from the rest of the day. She granted me this. I did not ask her permission to use either of her two automobiles, and she did not instruct me not to use them. Whether or not she knew I had the Buick automobile, I do not know, except that she knew early Sunday morning when the accident was first reported to her.

I left my employer's place about 4:00 P. M. August 7, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes which consisted of business and pleasure. About 12:30 A. M. August 8, 1926, I left San Francisco to return to Saratoga. My average speed was thirty-five miles an hour. When I last looked at my watch, I had just passed Redwood City, and noted that the time was about 3:00 A. M.

I was approaching the town of Atherton, San Mateo Co., and just as I entered the main intersection (the one that leads to the S. P. Depot), I first noticed two men ahead of me, on foot and on

the pavement approximately five feet from the western edge of the paved portion of the highway. I immediately sounded the horn, and in fact, held my hand on the button for a long time. It sounded loudly and longly. I had slowed down my speed from thirty-five miles an hour to about thirty as I approached the intersection, and after seeing the men, continued at this pace. After sounding my horn, I swerved to the left so that my car was riding upon the center of the Highway. When I first saw these men they [36] were about half a block away. I proceeded, and they made no attempt to get off the highway or out of the way of traffic coming in any direction. When I realized that I was close enough to almost run into them, I again swerved sharply to the left, so that my car was nearly on the eastern edge of the highway. It was just at this juncture that one of the men reeled or lurched in front of the front right fender, and consequently was struck. I believe that if this man had not reeled or lurched that he would not have been hit, and that my efforts to avoid an accident would have been successful. When I brought the car to a stop this man was lying on the center of the highway about one and one-half of my car lengths behind my stopped car. There were no witnesses to the accident, and I took the injured man to the Palo Alto General Hospital. His companion accompanied me, and I might state that he was very much under the influence of alcohol as will Dr. Russel V. Lee, and the Palo Alto Police authorities verify. I first learned of the death of the man who I had

(Deposition of Roy Hooper.)

struck at the Palo Alto General Hospital, shortly after I arrived there, also his name.

I went back to the scene of the accident with a Palo Alto police officer, whom I picked up before going to the hospital; about an hour and a half later. This officer saw my skid marks, and the manner in which the accident occurred, and stated to me that he did not believe the accident could have been my fault.

I arrived back at the ranch about 8:15 A. M. August 8, 1926, after having stayed at Joe Bargass' place (Mrs. Kittredge's foreman) since 6:30 A. M.

I have read the above and it is true to the best of my knowledge and belief.

ROY HOOPER.

Witness: G. R. A. BROWNE, Jr." [37]

Q. The name "Roy Hooper" that appears at the bottom of the writing there is your signature?

A. My signature.

Q. You remember writing your name "Roy Hooper" on that document?

A. I remember that, but I never remember reading it.

Q. You don't remember reading the document?

A. No.

Q. Do you remember having had a conversation wih Mr. G. R. A. Brown, Jr., at Palo Alto on the 9th of August, 1926?

A. Some man there, but I don't recall his name—Brown, Jones, or Smith or what.

(Deposition of Roy Hooper.)

Q. And where was this in Palo Alto your conversation with Mr. Brown or with somebody, who presented this document to you, that we have been speaking about?

A. Some coffee shop down there or confectioner or some restaurant.

Q. In Palo Alto? A. Yes.

Q. Now, did this gentleman tell you that he was from the Indemnity Insurance Company of North America?

A. He was from an Insurance Company. He didn't say "Indemnity Company"—North America, but had nothing to say of Indemnity Company.

Q. Did he tell you he was representing the insurance carrier for Mrs. Kittredge, or words to that effect? A. I believe he did, yes.

Q. Now, did you make a statement to him at that time about the accident and what you had been doing on the day of the accident?

A. I believe I did.

Q. Now, what would you say now as to whether or not you spoke with him about this accident and gave to him any of the facts in reference to the accident and to your actions the afternoon of the accident, after having left Mrs. Kittredge's place?

A. The afternoon after I left Mrs. Kittredge's? [37A]

Q. Yes, afternoon of the accident?

A. I don't get your question.

Q. Did you say anything to him in reference to what you had done the afternoon of the accident

(Deposition of Roy Hooper.)

after you left Mrs. Kittredge's place, and give him any statement of what you had done that evening, and how the accident occurred?

A. Yes, I told him how the accident occurred.

Q. And did you see him write any of your statement down on paper?

A. He was writing something. I didn't know what he was putting on there.

Q. He was having a conversation with you and then he was writing something down? A. Yes.

A. After he got through with his conversation with you at Palo Alto, he presented a document to you, which you signed?

A. Signed that. If I had read it, I wouldn't have signed it.

Q. You wouldn't have signed it?

A. No, not the way it was written.

Q. Why wouldn't you sign it?

A. Because there are a few mistakes.

Q. There are a few mistakes? A. Yes.

Q. I will ask you, Mr. Hooper, if at your conversation with Mr. Brown at Palo Alto on August 9, 1926, you didn't tell him that your name was Roy Hooper and your address was c/o Mrs. Mary C. Kittredge at Saratoga, California, did you tell him that?

A. No, not Mary C.—Mrs. E. H. Kittredge.

Q. Did you tell him at that conversation when you and he were present, "that on the afternoon of August 7th this year (meaning 1926) I asked permission of my employer, Mrs. Mary C. Kittredge,

(Deposition of Roy Hooper.)

for relief from work for the rest of the day. She granted me this." Did you tell him that?

A. She granted me this. I asked permission for the use of the automobile. [38]

Q. Did you tell Mr. Brown at that time and place you had asked Mrs. Kittredge for relief from work for the rest of the day and she granted you relief for the rest of the day? A. Yes.

Q. Did you tell Mr. Brown at that time and place that you did not ask Mrs. Kittredge's permission to use either of her two automobiles and she did not instruct you not to use them? A. No.

Q. Did you not make any such statement to him?

A. No.

Q. Did you make this statement to Mr. Brown at that conversation and at that place, or substantially this statement "whether or not she (meaning Mrs. Kittredge) knew I had the Buick automobile, I do not know, except that she knew early Sunday morning when the accident was first reported to her?" A. No, sir.

Q. Nothing of the kind? A. No.

Q. At the same conversation I will ask you whether or not you made this statement to Mr. Brown, or words substantially the same, "I left my employer's place (Mrs. Kittredge's) about 4:00 P. M. August 7, 1926, in her Buick car, and went to San Francisco, in pursuit of my own purposes which consisted of business and pleasure?"

A. Correct.

(Deposition of Roy Hooper.)

Q. Did you make that statement to Mr. Brown at that time and place? A. Yes.

Q. There is no mistake about it—that statement you made to Mr. Brown?

A. I made a statement to Mr. Brown I left the ranch of Mrs. Kittredge for business and pleasure.

Q. I am asking you if you made this statement, "I left my employer's place about 4 P. M. August 7, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes which consisted of business and pleasure." Did you make that statement? A. No.

Q. You did not make that statement?

A. No. [39]

Q. Now, you have read the rest of the statement with reference as to how the accident happened, Mr. Hooper. Did you substantially make that statement to Mr. Brown at that time as to how the accident happened?

Q. I will read it by paragraph. I will ask you at that time and place you made this statement, or its substance, to Mr. Brown: "I was approaching the Town of Atherton, San Mateo County, and just as I entered the main intersection (the one that leads to the S. P. Depot), I first noticed two men ahead of me, on foot and on the pavement approximately five feet from the western edge of the paved portion of the highway." Did you make that statement? A. Yes.

Q. Now, then, at the same time, did you make this statement: "I immediately sounded the horn, and

(Deposition of Roy Hooper.)

in fact, held my hand upon the button for a long time. It sounded loudly and longly." Did you make that statement in substance? A. Yes.

Q. And at the same time did you make this statement, "I had slowed down my speed from 35 miles an hour to about 30 as I approached the intersection, and after seeing the men continued at this pace"—did you make that statement? A. Yes.

Q. I will ask you if you further made this statement at that time: "After sounding my horn, I swerved to the left so that my car was riding upon the center of the highway. When I first saw these men they were about half a block away." Did you make that statement to Brown at that time?

A. Yes.

Q. I will ask you if you made this further statement to him at that time: "I proceeded, and they made no attempt to get off the highway or out of the way of traffic coming in any direction. When I realized I was close enough to almost run into them, I again swerved sharply to the left, so that my car was nearly on the eastern edge of the highway." Did you make that statement to him? A. Yes. [40]

Q. I will ask you if you made this further statement to him at that time and place: "It was just at this juncture that one of the men reeled or lurched in front of the front right fender, and consequently was struck. I believe that if this man had not reeled or lurched, he would not have been hit and that my efforts to avoid an accident would have been

(Deposition of Roy Hooper.)

successful." Did you make that statement to Mr. Brown at that time? A. Yes.

Q. I ask if you made this further statement to him at that time: "When I brought the car to a stop this man was lying on the center of the highway about one and one-half of my car lengths behind my stopped car. There were no witnesses to the accident, and I took the injured man to the Palo Alto General Hospital." Did you make that statement to Mr. Brown at that time?

A. I made no statement there was no witness. There was one witness.

Q. But otherwise the statement was made by you?

A. There was no witness. There was one witness. He had a friend with him.

Q. You did not tell Mr. Brown there was no witness? A. No.

Q. Now, did you tell him at that time and place, substantially as follows: "His companion accompanied me, and I might state that he was very much under the influence of alcohol as will Dr. Russel V. Lee, and the Palo Alto Police authorities verify"? A. Yes.

Q. You made that statement? A. Yes.

Q. Did you make the next statement: "I first learned of the death of the man who I had struck at the Palo Alto General Hospital, shortly after I arrived there, also his name." You made that statement at that time? A. Yes.

Q. I will ask if you made this statement to Mr. Brown at that time: "I went back to the scene of

(Deposition of Roy Hooper.)

the accident with a Palo Alto police officer, whom I picked up before going to the hospital; about an hour and a half later." Did you make that statement to [41] Mr. Brown at that time?

A. I went back to the scene with a Palo Alto policeman.

Mr. BARATY.—Did you make this statement to Mr. Brown at this time: "This officer saw my skid marks and the manner in which the accident occurred, and stated to me that he did not believe the accident could have been my fault"? Did you make that statement to Mr. Brown at that time?

A. Yes.

Q. I will ask you if you made this statement to Mr. Brown at that conversation: "I arrived back at the ranch about 8:15 A. M. on August 8, 1926, after having stayed at Joe Bargass' place (Mrs. Kittredge's foreman) since 6:30 A. M." Did you make that statement to Mr. Brown at that time?

A. I arrived back at the ranch at 8:15 A. M., August 8, having stayed at Joe Bargass' place—Mrs. Kittredge's foreman—since 6:30? No 6:30 about it. It was nearer 7:30 than anything else.

Q. Nearer 7:30 when you got to his place?

A. Yes.

Q. Was it nearer 8:15 when you got to the ranch?

A. Yes.

Q. Now, on that statement there appears this: I will ask you if you read what I am going to read to you before you signed: "I have read the above and it is true to the best of my knowledge and be-

(Deposition of Roy Hooper.)

lief." Was that statement read by you before you signed it? A. Can't recall ever reading.

Q. Would you say you did not read it?

A. I can't recall ever reading the statement.

Redirect Examination.

Part of my business that night coming to San Francisco was to deliver the package at the Fairmont Hotel.

Q. Had you ever driven either the Buick or Ford car of Mrs. Kittredge to San Francisco prior to the 8th of August, 1926?

Mr. BARATY.—To which we object on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. [42]

Mr. BARATY.—We will note an exception.

Mr. BROWN.—That is the plaintiffs' case.

Mr. BARATY.—The defendant, Indemnity Insurance Company of North America, at this time, your Honor, moves for an order and judgment of nonsuit on the grounds that the evidence produced is not sufficient to meet the allegations of the complaint in this respect:

1. That there is no evidence showing or tending to show that Roy Hooper, at the time of the accident in question, was acting as the agent of Mrs. Mary C. Kittredge.

2. That there is no evidence showing or tending to show that at the time of the accident in question, Roy Hooper, as alleged in the complaint, was driv-

(Testimony of Robert W. Forsyth.)

ing this automobile of Mary C. Kittredge with the permission of said Mary C. Kittredge.

The COURT.—The motion for nonsuit is denied, and exception noted.

TESTIMONY OF ROBERT W. FORSYTH, FOR DEFENDANT.

ROBERT W. FORSYTH, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

I reside in San Mateo. I am manager of the Coast Department of the Indemnity Insurance Company of North America, the defendant in this case. I have access to all of the files in my office concerning the Forrest-Kittredge-Hooper matter. I have delivered these files to you, Mr. Baraty.

Q. Now, Mr. Forsyth, I show you a document here that has come from your files, which purports to be a policy of insurance, all in printed form. Could you tell the Court and jury whether this is a copy of the policy in question here—that is to say, that as an addition to the document that I am showing you, the original of which was delivered to Mrs. Kittredge, her name appeared as assured, [43] the Buick car in question was mentioned in the policy, and it was duly signed by the officers of your company, and in force and effect on the sixth day of August, 1926, the day of this accident?

(Testimony of Robert W. Forsyth.)

A. Yes, sir.

Q. Would you say that this is a correct copy of that policy? A. Yes, sir.

Mr. BARATY.—Now, with these amendments, your Honor, we would like to offer this in evidence as the policy in question here, which will be supplemented by adding the name of the assured, Mrs. E. H. Kittredge, the Buick car in question here, and the signatures of the officials of this company, and the stipulation by us that it is the policy that was in force and effect on the day in question, and ask that it be marked Defendant's Exhibit "B."

The said document referred to was received in evidence and marked Defendant's Exhibit "B."

Said Defendant's Exhibit "B" was in the words and figures following:

DEFENDANT'S EXHIBIT "B."

"Automobile Policy.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

PHILADELPHIA.

A Stock Company.

(Hereinafter called the Company)

HEREBY AGREES WITH THE ASSURED

Named in the Declarations attached hereto and hereby made a part hereof, as respects bodily injuries (or death resulting at any time therefrom) and property damage accidentally suffered or al-

leged to have been suffered by any person or persons during the term of this Policy, resulting from the ownership, maintenance or use, including loading or unloading, of any of the automobiles described in the Declarations, at any location within the United States of America or the Dominion of Canada, and also as respects direct loss or damage to any such automobile or automobiles when accidentally sustained within said territorial limits, as follows: [44]

SECTION A. Public Liability. Provided specific premium charge is made in Section A, Item 1, of the Declarations:

TO PAY, within the limits specified in the Declarations, any loss by reason of the liability imposed by law upon the Assured for such bodily injuries or death so resulting;

TO DEFEND, in the name and on behalf of the Assured, all claims or suits for such injuries for which the Assured is, or is alleged to be, liable;

TO PAY all costs and expenses incurred with the Company's written consent;

TO PAY all court costs taxed against the Assured in any such suit;

TO PAY all interest accruing upon any judgment in any such suit up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the Company is liable;

TO REPAY to the Assured the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident.

SECTION B. Property Damage. Provided specific premium charge is made in Section B, Item 1, of the Declarations:

TO PAY, within the limits specified in the Declarations, any loss by reason of the liability imposed by law upon the Assured for such damage or destruction of property of every description (excluding property of the Assured or property in the custody of the Assured for which the Assured is legally responsible, or property carried in or upon any automobile of the Assured), including loss of use of such property damaged or destroyed;

TO DEFEND, in the name and on behalf of the Assured, all claims or suits for such damage for which the Assured is, or is alleged to be, liable;

TO PAY all costs and expenses incurred with the Company's written consent;

TO PAY all court costs taxed against the Assured in any such suit.

TO PAY all interest accruing upon any judgment in any such suit up to the date of the payment or tender to the judgment creditor, or his attorney of record, of the amount for which the Company is liable.

SECTION C—Collision. Provided specific premium charge is made in Section C, Item 1, of the Declarations:

TO PAY to the Assured the actual loss incurred during the term of this Policy, not exceeding the actual cost of suitable repair or replacement, by reason of damage to or destruction of any automobile or automobiles described herein, including operating

equipment while attached thereto, if caused solely by accidental collision with another object, either moving or stationary, excluding, however, damage or destruction by fire from any cause whatsoever.

It is agreed that the amount deductible as stated in Section C, Item 1, of the Declarations shall be deducted in the case of every collision from the amount of damage sustained.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

Additional Assured. A. It is hereby understood and agreed, unless limited by endorsement attached hereto, that this Policy is extended to cover as additional Assured any person or persons [45] while riding in or legally operating any automobile described in the Declarations and any person, firm or corporation, legally responsible for the operation thereof (exception always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employees thereof) provided such use or operation is with the permission of the named Assured or, if the named Assured is an individual, with the permission of an adult member of the Assured's household other than a chauffeur or domestic servant; but in no event shall the extension of insurance herein provided be considered to apply to an automobile operated for the transportation of passengers for hire, or to cover the purchaser of any automobile described herein if sold, or a transferee or assignee of this Policy except by the direct consent of the Company in the manner indicated in Condition H. of this policy.

Limitation of Liability. B. The liability of the Company under this Policy is limited as expressed in Item 1 of the Declarations which limits shall apply however to each automobile covered hereunder, and the limits shall not apply to the cost of defense of claims or suits, court costs, interest accruing upon any judgment as above limited or the cost of immediate surgical relief, as provided for herein.

Exclusions. C. This Policy shall not cover in respect of any automobile: (1) while driven or manipulated in any race or speed test; (2) while driven or manipulated by any person under the age fixed by law or under the age of sixteen years in any event; (3) while being used for towing or propelling any trailer or any vehicle used as a trailer. This Policy does not cover: (a) any liability of the Assured to any employee of the Assured while engaged in the maintenance or use of any automobile; (b) any liability voluntarily assumed by the Assured; (c) any liability imposed by any workmen's compensation law or agreement; (d) any loss under Section C of this Policy resulting from damage to or destruction of any tire due to puncture, cut, gash, blowout or other ordinary tire trouble and excluding in any event damage to or destruction of tires unless caused by an accidental collision which also causes other damage to or destruction of the insured automobile.

Notice and Settlement. D. In the event of accident, the Assured shall give prompt written notice thereof to the Company or to one of its duly author-

ized agents, and (1) forward to the Company forthwith after receipt thereof every process, pleading or other paper of any kind relating to any and all claims, suits or proceedings. The assured shall at all times render to the Company all co-operation and assistance in his power, and whenever requested, shall aid in securing information and evidence and the attendance of witnesses, and in prosecuting appeals. The Assured shall make no settlement of any claim arising hereunder nor incur any expense other than for immediate surgical relief without the written consent of the Company. The Company shall have the right to settle any claim or suit at its own cost at any time. (2) In the event of disagreement as to the extent of damage to or destruction of any insured automobile the loss may be determined by two appraisers, one chosen by the Assured and one by the Company. The two appraisers, if unable to agree, may select a third. The award in writing of two appraisers shall determine the loss, damage or repairs. The Company and the Assured shall pay the appraiser respectively selected by each and shall bear equally the other expenses of the appraisal and of the third appraiser if one is selected. The Company may accomplish any repairs determined by the appraisers [46] by such means as it may select, or at the option of the Company, may replace the automobile (or its equipment) or pay in money the amount of loss or damage determined by the appraisers. The Company shall have reasonable time and opportunity to examine any damaged automobile (or its equipment) before re-

pairs are undertaken or physical evidence of the damage is removed, but the Assured shall not be prejudiced by any act on his part or in his behalf undertaken for the protection or salvage of the damaged automobile (or its equipment).

Cancellation. E. This policy may be cancelled at any time at the request of the Assured, or by the Company, upon written notice to the other party, stating when thereafter cancellation shall become effective, and the date of cancellation shall then be the end of the Policy period. If such cancellation is at the Company's request, the earned premium shall be computed and adjusted *pro rata.* If such cancellation is at the Assured's request, the earned premium shall be computed and adjusted at short rates in accordance with the table printed hereon. Notice of Cancellation mailed to the address of the Assured as given herein shall be sufficient notice, and the Company's check, similarly mailed, a sufficient tender of any unearned premium.

Special Statutes. F. If any of the terms or conditions of this Policy conflict with the law of any State in which coverage is granted, such conflicting terms or conditions shall be inoperative in such State in so far as they are in conflict with such law. Any specific statutory provision in force in any State in which coverage is granted shall supersede any condition of this Policy inconsistent therewith.

Subrogation. G. The Company shall be subrogated in case of any payment under this Policy, to the extent of such payment, to all the Assured's

rights of recovery therefor against any party or other entity.

Assignment. H. No assignment of interest under this Policy shall bind the Company unless its consent shall be endorsed hereon.

Changes. I. No condition or provision of this Policy shall be waived or altered, except by endorsement attached hereto, signed by the President, a Vice-President, Secretary or an Assistant Secretary of the Company, nor shall knowledge possessed by any Agent or by any other person be held to effect a waiver or change in any part of this contract. Changes in the written portions of the Declarations may be made by the Agent countersigning this Policy, such changes binding the Company when initialed or signed by such Agent.

Bankruptcy. J. In the event of the bankruptcy or insolvency of the Assured, the Company shall not be released from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency an execution against the Assured is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person against the Company under the terms of this Policy for the amount of the judgment in said action, not exceeding the amount of this Policy.

Acceptance. K. The Assured by the acceptance

(Testimony of Robert W. Forsyth.)

of this Policy declares the several statements in the Declarations to be true, and this Policy is issued in consideration thereof and of the [47] payment of the premium.

IN WITNESS WHEREOF, the INDEMNITY INSURANCE COMPANY OF NORTH AMERICA has caused this Policy to be signed by its President and Secretary at Philadelphia, Pennsylvania, and countersigned by a duly authorized Agent of the Company.

Countersigned: ————————————,

Agent."

Q. Mr. Forsyth, I will show you a document and just ask you to familiarize yourself with it (counsel handing a paper to the witness). Now, was that document among the papers given to me?

A. Yes.

Q. And in the file in the Forrest-Kittredge case in your office? A. Yes.

Q. And does it bear the marks relative to your establishment?

A. Yes. It says here, "Sent to Home office," with date and the initial.

Q. And that is the manner that assists you to identify it? A. Yes, one of our stamps.

Mr. BARATY.—Now, your Honor, we desire to offer this document in evidence.

Mr. BROWN.—It is objected to on the grounds that it is immaterial and incompetent evidence and hearsay, and not binding on us in any way.

Mr. BARATY.—The purpose of it, your Honor, is to show that Mary C. Kittredge, in her lifetime, complied with the provisions of the policy by notifying this defendant insurance company of the occurrence of an accident and giving her views as to what she knew about the case. It substantiates our defense in this case that we do not consider ourselves liable to the plaintiff here in this action. Now, that is one of the chain of circumstances that makes for our defense.

The COURT.—The objection is sustained and an exception is noted.

The COURT.—It may be admitted as Defendant's Exhibit "C" for identification. [48]

Said Defendant's Exhibit "C" for identification is in the words and figures following: (Here insert Defendant's Exhibit "C" for identification.

DEFENDANT'S EXHIBIT "C" FOR IDENTIFICATION.

Sent to Home Office—
Date 5-2-27.
B.

Saratoga, Sept. 26, 1926.

Indemnity Insurance Co. of N. America:
Gentlemen:

Referring to the accident in the early part of August when the unfortunate death of a pedestrian occurred through being hit by my Buick sedan while being driven by Roy Hooper, the fact is that the car was being used by him that night without

(Testimony of Robert W. Forsyth.)

my knowledge or permission. As I learned after the accident, he took the car secretly and drove from Saratoga to San Francisco for his own private purposes entirely; and it was while he was on his way back to Saratoga in the early hours of the morning that the accident occurred. He was allowed to have Saturday nights free as a rule; and was in the habit of going those evenings to San Jose. For that purpose he had general permission to use a Ford runabout; but his express instructions were that he should never use the Buick sedan without first obtaining special permission. On the evening in question he took the car without permission, nor did I know that he had taken it until I was informed of the accident on the following day. Neither did I know of any intention on his part to go to San Francisco.

MARY C. KITTREDGE.

Witness:

W. P. JOHNSON.

[Endorsed]: United States District Court. No. 18,331. Forrest vs. *Indem.* Deft. Exhibit No. "C" for Iden. Filed 2/11/30. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

WITNESS.—(Continuing.) I knew of the existence of the action referred to that was pending in San Mateo County, and which has been mentioned in this case, in which Mrs. Forrest and her son were plaintiffs and the Indemnity Insurance Company of North America, and Roy Hooper and

(Testimony of Robert W. Forsyth.)

others, were defendants. I knew of the existence of that suit, because the papers in that suit were forwarded to us by the assured, Mrs. Kittredge. That is the action that was afterwards dismissed as against Mrs. Kittredge on account of her death.

Q. Were you ever notified by Roy Hooper, the chauffeur that process had been served upon him in the action pending in San Mateo county?

A. No.

Cross-examination.

Q. Mr. Forsyth, weren't you informed of the pendency of this suit and the service of this summons on Hooper by Mr. Baraty and the fact that he had been notified by Mr. Crawford and myself that this suit had been started and served upon Hooper and asking Mr. Baraty whether he wanted to appear on behalf of the company, and didn't Mr. Baraty communicate that to you?

Mr. BARATY.—That is objected to as incompetent, irrelevant and immaterial, it makes no difference at all. Mr. Baraty is not the defendant corporation.

The COURT.—Objection overruled; exception noted.

(By Mr. BROWN.)

Q. Will you answer the question?

A. I have no recollection of it.

Q. Do you mean to say that you can't recollect Mr. Baraty having explained to you about the fact that we served the summons on Hooper?

A. No. I have no recollection of it.

(Testimony of Robert W. Forsyth.)

Q. Don't you remember further that you told Mr. Baraty to inform [49] us that the company was not interested in the matter? A. No.

Q. And we also gave Mr. Baraty Mr. Hooper's address and told him that no default would be entered in this case? We gave him every opportunity to defend? You just don't remember that?

A. No, I don't.

TESTIMONY OF G. R. A. BROWN, JR., FOR DEFENDANT.

G. R. A. BROWN, Jr., called as a witness for defendant Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

I reside in San Francisco. At present I am not employed. I was formerly employed by the defendant, the Indemnity Insurance Company of North America, in the capacity of claims adjuster and investigator of automobile accidents. In that capacity I investigated the Hooper-Forrest accident. As soon as I was advised that the accident had taken place—I believe it was the next day—I went to Saratoga to where Mrs. Kittredge lived, and she related the facts of the accident to me in so far as she knew them.

I first saw Roy Hooper in connection with this accident at the coroner's inquest at Palo Alto, but I did not have any conversation with him until after

(Testimony of G. R. A. Brown, Jr.)

the inquest. I arrived at the inquest during the latter part of his testimony. After the inquest had concluded I wanted to get Roy Hooper's version of the accident, and all the details concerning it, so I asked him if he would go with me to some place where we could talk it over. We did not want to stand on the street and talk, so we went to Wilson's Candy Store. I drew a diagram of the accident. There was no one else with us during our conversation that afternoon.

I told Roy Hooper what my name was and that I was representing the Indemnity Insurance Company of North America, who was the [50] company that insured his employer, Mrs. Kittredge's automobile, and that as a representative of that company I wanted him to give me the facts of the case. He gave me a statement. That statement was transcribed into longhand writing. I did not urge him or make any threats. I asked him how the accident occurred, and he explained it to me, and after he got through explaining how it happened, I said, "We had better write it down in longhand so we can have something in black and white, a definite memorandum of the same in the form of a statement," and I said, "I will write the statement out in my own hand, because possibly I can express the case a little better than you can. I am accustomed to do this particular thing. I will write it out as you tell me." And this is what I took down. He practically dictated it to me. He dictated the facts and details and I wrote them

(Testimony of G. R. A. Brown, Jr.)

down. This writing was done in Wilson's Candy Store at Palo Alto.

Q. I will show you a document, and it is in evidence here and marked Defendant's Exhibit "A," and I will ask you if you ever saw that document before? (Counsel handing a document to the witness.) A. Yes, I saw it; I wrote it myself.

Q. Is that the document that you have been referring to, that was written out at Wilson's Candy Store?

A. That is the document. All the writing, with exception of the signature, Roy Hooper, is mine, with the exception of his initials on the first page.

Q. And the name Roy Hooper, who affixed that name to the document? A. Roy Hooper.

Q. Himself? And on the reverse side of the first page, down at the bottom there appear some initials. Can you say what initials those are?

A. Those initials are R. O. H., representing his name, Roy O. Hooper,

Q. Who put them there?

A. He did, at my request, in my presence. [51]

Q. Yes. Now, what was done in connection with his signature? Was the document read to him, or did he read it there himself?

A. Well, as I said before, he dictated the facts of the case to me. I just—what I have written down there, except that I might have worded it differently, in different phraseology and used better grammar than he would have used, and then I asked him after I had finished writing it if he would read

(Testimony of G. R. A. Brown, Jr.)

it over and see if any mistakes had been made by me, and if it was correct in every detail as far as he knew, and to take note of the last paragraph, which says, "I have read the above and it is true to the best of my knowledge and belief." And after that he signed his name to it and so did I.

Q. Now, will you please read that document to the Court and jury?

A. "Palo Alto, Calif., August 9, 1926. My name is Roy Hooper, my address is care of Mrs. Mary C. Kittredge, Saratoga, California.

"On the afternoon of August 7th this year I asked permission for the rest of the day. She granted me this. I did not ask her permission to use either of her two automobiles, and she did not instruct me not to use them whether or not she knew I had the Buick automobile, I do not know, except that she knew early Sunday morning when the accident was first reported to her.

"I left my employer's place about 4:00 P. M. on August 7, 1926, in her Buick car and went to San Francisco in pursuit of my own purposes which consisted of business and pleasure. About 12:30 A. M. August 8, 1926, I left San Francisco to return to Saratoga. My average speed was thirty-five miles an hour. When I last looked at my watch, I had just passed Redwood City, and noted that the time was about 3:00 A. M.

"I was approaching the town of Atherton, San Mateo Co., and just as I entered the main intersection (the one that leads to the S. P. Depot) I first

(Testimony of G. R. A. Brown, Jr.)
noticed two men ahead of me, on foot and on the pavement, approximately five feet from the western edge [52] of the paved portion of the highway. I immediately sounded the horn, and in fact, held my hand upon the button for a long time. It sounded loudly and longly. I had slowed down my speed from thirty-five miles an hour to about thirty as I approached the intersection, and after seeing the men continued at this pace. After sounding my horn, I swerved to the left so that my car was riding upon the center of the highway. When I first saw these men they were about half a block away. I proceeded, and they made no attempt to get off the highway or out of the way of traffic coming in either direction. When I realized that I was close enough to almost run into them, I again swerved sharply to the left, so that my car was nearly on the easterly edge of the highway. It was just at this juncture that one of the men reeled or lurched in front of the front right fender, and consequently was struck. I believe that if this man had not reeled or lurched that he would not have been hit, and that my efforts to avoid an accident would have been successful. When I brought the car to a stop this man was lying on the center of the highway about one and one half of my car-lengths behind my stopped car. There were no witnesses to the accident, and I took the injured man to the Palo Alto General Hospital. His companion accompanied me, and I might state that he was very much under the influence of alcohol as will Dr. Russell V.

(Testimony of G. R. A. Brown, Jr.)

Lee, and the Palo Alto police authorities verify. I first learned of the death of the man who I struck, at the Palo Alto General Hospital, shortly after I arrived there, also his name.

"I went back to the scene of the accident with a Palo Alto Police officer, whom I picked up before going to the hospital, about an hour and a half later. This officer saw my skid marks, and the manner in which the accident occurred, and stated to me that he did not believe the accident could have been my fault.

"I arrived back at the ranch about 8:15 A. M. August 8, 1926, [53] after having stayed at Joe Bargass' place (Mrs. Kittredge's foreman) since 6:30 A. M.

"I have read the above and it is true to the best of my knowledge and belief." Signed, Roy Hooper, and witnessed by myself.

Q. Your name? A. G. R. A. Browne, Jr.

Q. What is your memory now as to the statement there given to you by Hooper? Are those the facts given to you by Hooper?

A. Oh, yes, sir, those are the facts given to me by Hooper. Right after the inquest.

WITNESS.—(Continuing.) I saw Mrs. Mary C. Kittredge, the afternoon of the day the accident occurred. The accident happened about three o'clock in the morning, and I saw her the same afternoon at her home in Saratoga. That was before I had had my interview with Roy Hooper.

(Testimony of G. R. A. Brown, Jr.)

Q. What did she say to you, if anything, concerning the accident that occurred on the 8th day of August, 1926?

Mr. BROWN.—Objected to as immaterial and hearsay and not binding on us.

The COURT.—Sustained; exception noted.

Mr. BARATY.—Will you stipulate, Mr. Brown, that Mrs. Mary C. Kittredge died on the 20th day of October, 1926?

Mr. BROWN.—We will so stipulate.

Mr. BARATY.—I would like to renew the last question.

Mr. BROWN.—We will repeat the same objection, and on the same ground.

The COURT.—Same ruling and exception.

Q. You had a conversation with Mrs. Kittredge the same day of the accident? A. Yes.

Q. What did Mrs. Kittredge say to you—what did she say to you in the conversation held by yourself with her at her premises on [54] the day of the accident, concerning the matter of her automobile, or whether she gave Roy Hooper permission to use the car, for her or for himself?

Mr. BROWN.—Same objection on the same ground.

The COURT.—Sustained; exception noted.

WITNESS.—(Continuing.) I left the employment of the Indemnity Insurance Company of North America, about the month of January, 1927. I do not recall exactly, but it was about six months after the accident.

(Testimony of G. R. A. Brown, Jr.)

Cross-examination.

When I took this statement I was a salaried employee of the insurance company; and it was part of my duties to take statements generally in all accidents. And to take these statements from all the witnesses and reduce them to writing, and return them to the insurance company. In these statements I employed my own language, and in this statement, I used such phraseology as I thought would express the facts better than Mr. Hooper's language, and I wrote down what he stated, and I wrote down what to my mind stated, expressed and conveyed the idea that he wanted to convey, in better language.

Now, then, Mr. Browne, did you observe that apparent outstanding inconsistency in the statement that Mr. Forrest, the deceased, was walking down the highway with a companion, and also immediately following that statement that there were no witnesses to the accident?

A. Yes, I observed that, because right after I wrote the statement in, I said, "Where is the companion that was with him?"

Q. But you left the statement in there nevertheless that there were no witnesses to the accident, didn't you? A. Yes, I did; not intentionally, yes.

Redirect Examination.

Mr. BARATY.—What did Roy Hooper say to you in reference to his [55] having the automobile at the time in question, whether he had permis-

(Testimony of G. R. A. Brown, Jr.)

sion or whether it was his work or Mrs. Kittredge's work that he was doing at the time?

A. He told me in Wilson's Candy Store that he took the machine on his own accord, or responsibility, without asking her for it, and that his employer did not know he had the Buick Sedan.

Recross-examination.

(By Mr. BROWN.)

Q. Now, then, Mr. Browne, have you got in that statement anything to the effect that he took the automobile? Let's see the statement. You have in that statement this language: "She granted permission to take it." You have that in here. Mrs. Kittredge granted the permission to take it that day. A. Got it at four o'clock, and—

Q. And that he did not ask her permission to use the car and he didn't know whether she knew it or not? A. That is true.

Q. But he didn't tell you that he used it of his own accord and of his own volition? Did he use those words?

A. He didn't use the words "accord and volition." He said he took the car.

Q. What he did say, according to your best recollection, is what you have written down here?

A. I remember what he told me. He told me so much as I have written down.

Q. That is your own language, the thought that was conveyed to your mind in describing what he said to you? A. That is quite right.

(Testimony of G. R. A. Brown, Jr.)

Q. You think that he used of his accord and volition? A. Yes.

Mr. BARATY.—If the Court please, we have Judge Walter Perry Johnson under subpoena.

Mr. BROWN.—What do you expect to prove by him? Maybe we can dispose of that. [56]

Mr. BARATY.—I want to prove by Judge Walter Perry Johnson that the policy in question was in his possession, as executor of his sister's estate, Mrs. Mary C. Kittredge, deceased, and was destroyed by him, at the termination of the estate proceedings.

Mr. BROWN.—All right. We will stipulate as to that.

Mr. BARATY.—And I want to prove by the same witness that Defendant's Exhibit "C" for identification is in his handwriting.

Mr. BROWN.—I will stipulate to that.

Mr. BARATY.—I want to prove by the same witness that the handwriting of this entire document (Defendant's Exhibit "C" for identification), other than that of Mary C. Kittredge, is in the handwriting of Judge Walter Perry Johnson, and that the signature, "Mary C. Kittredge" is in the handwriting of Mary C. Kittredge, and that the said Mary C. Kittredge is the Mrs. Kittredge in the policy in question.

Mr. BROWN.—We will stipulate to that, too.

Mr. BARATY.—Will you further stipulate that

(Testimony of Joseph Bargass.)

Judge Walter Perry Johnson is the brother of Mary C. Kittredge, and was executor of her estate?

Mr. BROWN.—We will stipulate.

TESTIMONY OF JOSEPH BARGASS, FOR DEFENDANT.

JOSEPH BARGASS, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows: [57]

Direct Examination.

I reside at Saratoga, Santa Clara County, and have lived there a little over thirty years. I used to be ranch foreman. Now I am assisting my wife and mother-in-law in running a boarding place there. I knew Mary C. Kittredge; I worked for her for about thirty years, up to the time of her death. I started in by doing gardening and driving for her, and then later on I had charge of the whole ranch.

I knew Roy Hooper, the chauffeur. I remember the occasion of the accident that he had with the Buick automobile. At that time I was working for Mrs. Kittredge as foreman of her ranch; the ranch was west of Saratoga, about three-quarters of a mile up on the sidehill, adjoining Senator Phelan's ranch. At that time and at the time of the accident in question, here, I lived down at our own place in Saratoga, about three-quarters of a mile away from the ranch.

(Testimony of Joseph Bargass.)

I remember seeing Roy Hooper on the day of this accident, that is, that morning, in the neighborhood of 5:00 o'clock in the morning.

Q. What happened?

A. Well, I was not up yet. It was Sunday morning, and then I heard a car running out of the yard. Of course, there were guests in the building, and I wondered who was out there, and my brother-in-law from Vallejo happened to get up, and he said there was a young fellow out there who wanted to see me. I said, "Who is he?" He said, "I don't know." So I dressed up and went out. I told him to drive down behind the garage and shut off the engine, because I did not want him to have the car running and disturbing people, so he went down with the car behind the garage and I went down there, and he looked very pale.

Q. Who looked very pale?

A. Hooper, and I says, "What is the matter?" and he said how he was in trouble, and I said, [58] "Well, what is the matter?" and he says—he said he had killed a man, and I said, "How did that happen?" and I says—I says, "Well, did Mrs. Kittredge know you took that car?" and he said, "No. That is what is bothering me." And I said, "That is bad policy." I said, "That is always the time when a person takes a machine that way without asking the owner, you always get into trouble." Well, he was worrying about the matter, why it happened, so he remained there for, oh, I should judge about an hour or so.

(Testimony of Joseph Bargass.)

WITNESS.—(Continuing.) From my house he went up to the ranch, and when I got there the matter had already been reported to Mrs. Kittredge.

Roy Hooper did not say anything to me about having delivered a package for Mrs. Kittredge. When I told him, "That is what you get for taking a car without permission," he just kind of mumbled; he didn't say anything, he was very pale and kind of nervous; I could not get much out of him.

Cross-examination.

I think I remember Mr. Crawford, I do not know his name, coming to see me on the 20th of October, 1929, down at my place. He talked with me about what occurred at the time Mr. Hooper came back from the accident.

Q. Did you tell Mr. Crawford at that time and place that you did not know what Roy Hooper meant when he said he didn't want Mrs. Kittredge to know about the accident?

A. I do not remember of saying that.

Q. Would you say you did not say that to him?

A. I do not remember saying that to him.

Q. You just don't remember?

A. Yes, I do not remember; I do not know that I did. [59]

TESTIMONY OF E. E. CRESSWELL, FOR DEFENDANT.

E. E. CRESSWELL, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

At the present time, and for some time prior to August, 1926, I have been the Pacific Coast Claim Manager of the Indemnity Insurance Company of North America, the defendant in this action. I am familiar with the action pending in San Mateo County, entitled Belva Forrest et al. against Kittredge and Hooper.

Subsequent to the service of process in that action upon Roy Hooper, Roy Hooper did not ever confer with me; at no time. He never delivered to me a copy of the process in that San Mateo action.

Now, you know Mr. Crawford, one of the attorneys for the plaintiffs here? A. Yes, I do.

Q. Do you know any conversations, and by that I mean more that one, relative to the fact that Hooper had been served in the San Mateo action, and the request by Mr. Crawford upon you and through your company that they were defending for Hooper? A. No, I do not.

Q. You do not remember any such a conversation? A. No, I do not.

Q. Mr. Crawford has been in your office?

A. Yes, he has, on other matters though, as I recall. [60]

TESTIMONY OF MRS. BELVA FORREST, FOR DEFENDANT.

BELVA FORREST, called as a witness for defendant, Indemnity Insurance Company of North America, being duly sworn, testified as follows:

Direct Examination.

(By Mr. BARATY.)

Q. What is your name, Madam?

A. Mrs. Belva Forrest.

Q. Is that your name now?

A. My name is Belva Dovan.

Q. Now, so that there may be no misunderstanding, did you just tell the Clerk that your name was Belva Forrest? A. Yes, sir.

Q. Now, your testimony is that your name is Belva Dovan? How do you spell that?

A. D-o-v-a-n.

Q. So that you are now married again?

A. Yes.

Q. And your husband's name is what?

A. John Dale Dovan.

Q. And you are living with him now as man and wife? A. I am.

Q. And what is his occupation?

A. He works for the Shell Oil Company.

Q. And where do you reside with him?

A. In Martinez.

Q. And how long have you been married to Mr. Dovan?

(Testimony of Mrs. Belva Forrest.)

A. We were married on July 12, of this year—of last year.

Q. Of 1929? A. Yes.

Mr. BARATY.—That is all.

Mr. BARATY.—Now, your Honor, in view of this testimony I would like to ask the Court for permission to inquire of the gentlemen of the jury whether any of them are acquainted with the lady's husband, or if any of them are in any way connected with the concern with which he is doing his work. I say that in the light of the situation that we have been laboring under the impression that the lady's name was Forrest, and that an opportunity to quiz the jury as to her present husband is, of course, not before us. [61]

The COURT.—The motion is denied, and exception noted.

Mr. BARATY.—The defendant rests.

TESTIMONY OF A. L. CRAWFORD, FOR PLAINTIFF (IN REBUTTAL).

A. L. CRAWFORD, being called as a witness for plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination.

I am an attorney at law, practicing since 1917 in San Francisco and Palo Alto. I am one of the attorneys for the plaintiff in this case and was one of the attorneys for the plaintiff in the case of Forrest et al. vs. Hooper and Mrs. Kittredge. I re-

(Testimony of A. L. Crawford.)

member about the time that Mr. Hooper was served with summons here in this city and county.

Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. Gus L. Baraty, one of the attorneys of record in that case?

Mr. BARATY.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled; exception noted.

A. I did.

WITNESS.—(Continuing.) At that conversation besides myself and Mr. Baraty, there was present Mr. Joseph A. Brown, one of the attorneys for the plaintiffs in this case, and the conversation took place on the 4th floor of the City Hall.

Q. What was that conversation.

Mr. BARATY.—We object to the question on the ground that it is incompetent, irrelevant, and immaterial.

The COURT.—Objection overruled; exception noted.

A. The conversation at that time between myself and Mr. Baraty and yourself was to the effect that we had served Hooper about the thirtieth day of January, 1928, and we [62] told him the incident surrounding the serving of Mr. Hooper and how it had taken such a long time to get in touch with Hooper. At that time I told Mr. Baraty that Mr. Hooper could be reached through 585 Geary Street, Hotel Heuer, this city. And that, further-

(Testimony of A. L. Crawford.)

more, we thought that he was then at Mills Field, and that we would do all in our power to assist in the matter and told Mr. Baraty to take it up with the company.

Q. And what did he say?

A. Mr. Baraty said at that time that he was not interested in litigation and was not providing business for himself. I believe that was the term. That was the substance of the conversation.

Q. But he said that he would take it up with the company? A. He did, also.

Q. And in the meantime no action was taken?

A. There was no action taken at that time.

Q. Did you see Mr. Baraty again before this default was entered?

A. Yes, I saw Mr. Baraty again.

Q. Do you remember where that was.

A. It was in the courtroom of what I believe is now the courtroom of Justice of the Peace Cornelius Kelly.

Q. That was on the third floor of the City Hall?

A. That was on the third floor of the City Hall, this city and county. At that time I again reminded Mr. Baraty, and asked him what he was going to do, and I told him that we had taken default of Mr. Hooper, but that we would give him ample opportunity to search plenty.

Q. Was anything said about what the Indemnity Insurance Company of North America had said?

(Testimony of A. L. Crawford.)

Mr. BARATY.—We object to that as incompetent, irrelevant and immaterial. It is in no way binding upon the defendant corporation. [63]

The COURT.—Objection overruled; exception noted.

A. Mr. Baraty at that time said that he had taken it up with the insurance company and that they were not interested. I believe those were the words that he used.

Q. Now, then, thereafter and before the default was entered in this case, did you have a conversation with Mr. Cresswell, of the insurance company?

A. I was in the office of the Indemnity Insurance Company of North America, and—

Q. Located where?

I think it is located at 206 Sansome Street, this city and county, and I believe it is on the second floor. At that time I spoke to Mr. Cresswell.

Q. Who was present?

A. I believe Mr. Cresswell and myself were in Mr. Cresswell's little office.

Q. And that was before default was entered?

A. That was prior to the entry of the default.

Q. What was said? What was the conversation between you and Mr. Cresswell?

A. At that time I told Mr. Cresswell that we were going to take the default of Mr. Hooper, but that we would give them some time yet. Mr. Cresswell said to me at that time that they were not interested; that they had a good defense to this suit; to go ahead. After some more conversation he stated

(Testimony of A. L. Crawford.)

that he had several statements. What they were, I do not know.

Q. Now, then, did you enter the default after that, some time after?

A. I believe that I entered the default about three weeks subsequent to that time.

Q. Now, then, did you have a conversation with Mr. Cresswell after the default had been entered?

[64] A. I did.

Q. In the same office?

A. The same office, on the same floor.

Q. What persons were present?

A. Myself and Mr. Cresswell.

Q. What did you tell him?

A. I told Mr. Cresswell at that time that we had taken the default and that judgment had been entered. I further told him that if he wanted to, we would set aside the default judgment, and that a trial could be had upon the merits.

Q. Was that the—all the conversations you had with him?

A. I have had several conversations since that time.

Q. With whom? A. With Mr. Cresswell.

Q. At the same place? A. At the same place.

Q. What was the next conversation?

A. Along the same tenor. There was one other thing in which I was involved which has nothing to do with this action. [65]

to that effect. It was about two or three weeks later that I had the first conversation with Mr.

(Testimony of A. L. Crawford.)

Cresswell, and then I had a few conferences with Mr. Cresswell later on.

This witness, being recalled by plaintiffs for further direct examination, in rebuttal, testified as follows:

On October 20, 1929, I had a conversation with Mr. Joe Bargass, at Saratoga. At that time I asked him what he recollected of the conversation he had had that morning with Roy Hooper.

Q. In response to that, what did he reply?

A. Mr. Bargass told me on that he made this statement to Mr. Hooper. He said, "You know you took the car without Mrs. Kittredge's permission, and you know that it is not good policy." And I asked Mr. Bargass at that time if he actually knew whether or not Mr. Hooper had done so, and if he had been in or about the ranch at the time that Mr. Hooper left the evening before, and he said, "No," that he was in San Jose, and that he did not arrive back at the ranch until some time after Mr. Hooper had left. And I asked him if he had seen Mrs. Kittredge when he returned from the ranch—to the ranch—and he said, "No," he had not. In view of that I said furthermore, I said, "Now, Mr. Bargass," I said, "do you or do you not know what Mr. Hooper meant when he said he did not want Mrs. Kittredge to know about this?" Those were the words I used, and he said, "I do not know." I said, "Do you know whether or not it was referring to the accident or whether it was referring to what you said when you said that Mr. Hooper had taken

(Testimony of A. L. Crawford.)

the car without Mrs. Kittredge's permission?" I discussed that matter with Mr. Bargass for over thirty-five minutes.

Cross-examination.

Q. Mr. Crawford, who said that they did not want Mrs. Kittredge to know that Hooper had killed a man? Who said that? [66]

A. Mr. Hooper said he did not want Mrs. Kittredge to know about this. Speaking of the fact that Mr. Hooper had struck Mr. Forrest and killed him.

Q. Now, that is your testimony that Hooper, the man who had caused the accident, told Mr. Bargas, the foreman, that he did not want his employer to know that he had killed a man a few hours after running into him with an automobile?

A. That is my testimony.

Q. Yes. Now, did Mr. Bargass tell you that he stated to Hooper, "That is what you get for taking an automobile without permission of the owner"?

A. That is what Mr. Bargas told me that morning also.

Q. He told you that also? A. Yes, sir.

Q. And to that what answer did Hooper make?

A. Hooper did not make any answer.

Q. So that you are definite on the proposition that Bargass said to Hooper that you are bound to have an accident, or accident occur, or words to

(Testimony of A. L. Crawford.)

that effect, when you take these things without the permission of the owner?

A. I am quite definite *of* that, because he made that statement.

Q. And that is the statement that you heard him make this morning here?

A. That is the same statement, practically in the same words.

Q. Now, then, the only thing that he added to the conversation is that Hooper said to Bargass, "I don't want Mrs. Kittredge to know that I killed a man. I don't want Mrs. Kittredge to know about this."

Q. Well, "About this." What did "about this" refer to?

A. As far as I understood from the tenor of the conversation with Mr. Bargass, it was about the death of Mr. Forrest and about the smash-up with the machine.

Q. Didn't you discuss with Bargass that Mrs. Kittredge was bound [67] to know about his death within a few minutes, because she only lived a quarter of a mile away?

A. That is quite true, but I also discussed with Mr. Bargass at the same time the fact that Mrs. Kittredge had been quite ill and the desire of Mr. Hooper to ease the shock, if possible. I discussed the matter of Mr. Bargass telling me at the time that he was the same as a member of the family. He had been in the employ of Mrs. Kittredge for thirty years, Mr. Baraty.

Mr. BARATY.—I think that is all.

Mr. BROWN.—That is all.

The COURT.—Is the testimony all in on both sides?

Mr. BROWN.—Yes.

Mr. BARATY.—Yes.

Mr. BARATY.—I desire to move the Court that this jury be dismissed, and that this action declared a mistrial for failure of the plaintiff to inform the Court or the jury of the marriage of the plaintiff, or the existence of her husband, whose occupation and whereabouts was not disclosed to the jury, and for all that we may know, there may be some of the jurors that do know her present husband; I make the motion on the grounds of prejudice to this defendant's case by reason of the failure to disclose the existence of the present husband.

The COURT.—The motion is denied, and exception noted.

Mr. BARATY.—We next move, your Honor, to reverse your ruling on the question of the admission of hearsay testimony in the deposition, and that your Honor sustain the objections made in open court to the hearsay testimony on the grounds that under Section 2032 of the Code of Civil Procedure of the State of California, depositions are taken subject to exceptions except as to the form of the questions; we contend that every question asked in a deposition, the objections as to the legality of the questions is reserved for the trial, and can be made at the trial, excepting [68] it be

for questions which are irregular in form, and then those objections have to be made and taken at the time the deposition is taken.

The COURT.—The motion is denied; exception noted.

Mr. BARATY.—At this time, I move the Court for a directed verdict in favor of the defendant, Indemnity Insurance Company of North America, and if the motion be not granted, that the case go to the jury the motion is made upon the insufficiency of the evidence, to sustain the allegations of the complaint.

The COURT.—Motion denied; exception noted. Now, you asked, Mr. Baraty, for permission to amend the answer to set up, what was it?

Mr. BARATY.—I wanted to set up the failure of Hooper to serve upon the defendant corporation the copy of the complaint; that is, comply with Section D of the policy requiring him to serve all legal process of the insurance company; and likewise, I want to amend to set off his failure to cooperate in the defense of that action as required by Section D of the policy; that was the initial motion made by me at the commencement of the trial; that is to say, I want to more specifically set forth the defense of failure to deliver the summons and complaint to the defendant insurance company, and the failure upon the part of Hooper to cooperate in the defense of that action with the insurance company.

The COURT.—I will allow that amendment.

The foregoing constituted all of the evidence given in the trial of said action. The defendant, Indemnity Insurance Company of North America, thereupon requested the Court to instruct the jury as follows, but the Court refused to give each of the following instructions, to which this defendant duly excepted. The instructions which were refused are as follows: [69]

DEFENDANT'S INSTRUCTIONS WHICH WERE REFUSED.

I.

You are instructed to find and return a verdict in favor of the defendant, Indemnity Insurance Company of North America.

III.

The evidence produced on the part of plaintiffs must be of greater weight, quality and convincing effect than that produced by the defendant. If, therefore, you find that the evidence produced by the plaintiffs and the evidence produced by the defendant Indemnity Insurance Company of North America is equally balanced, both in weight, quality and convincing effect, I instruct you that the plaintiffs have failed to prove the allegations of their complaint by the preponderance of the evidence. In that event, if you so find, your verdict must be against the plaintiffs and in favor of the defendant, Indemnity Insurance Company of North America.

VI.

You are instructed that if you should find that at the time of the said accident the said Roy Hooper was operating the said Buick automobile without the permission of said Mary C. Kittredge and was not operating the said automobile on the business or for or on behalf of said Mary C. Kittredge, then your verdict must be against the plaintiffs and in favor of defendant, Indemnity Insurance Company of North America.

VII.

You are instructed that if you should find that said Roy Hooper failed within a reasonable time after the receipt of same to deliver to defendant any pleading or paper or any kind relating to any claim, suit or proceeding arising out of said accident, that your verdict shall be against plaintiffs and in favor of defendant, Indemnity Insurance Company of North America. [70]

VIII.

You are instructed that if you should find that in the action brought by plaintiffs herein against said Roy Hooper, and in which judgment was recovered in favor of plaintiffs and against said Roy Hooper, that said Roy Hooper failed to render to the Indemnity Insurance Company of North America, all co-operation and assistance in his power in the defense of said action, then your verdict shall be against the plaintiffs herein and in favor of defendant, Indemnity Insurance Company of North America.

The Court instructed the jury as follows, and the instructions herein set forth were the only instructions that were given:

COURT'S CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen of the Jury:

I.

In an action of this nature the burden of proof is on the plaintiffs to establish all the material allegations in the complaint by a preponderance of the evidence, and if, upon a consideration of the whole case, you find that plaintiffs have failed to do this, or that the evidence balances equally, your verdict must be for the defendant, the Indemnity Insurance Company of North America.

II.

I instruct you that a witness wilfully false in a material part of his testimony is to be distrusted in other parts.

III.

I instruct you that in the consideration of this case, you are not to be influenced or controlled by any sympathy you may have for the plaintiff, but you are to consider only the evidence in the case and the law as the same is given to you by the Court.

It is a solemn duty that you have taken, under oath, to [71] discharge, that you will strive to reach a verdict in this case, regardless of any question of sympathy, prejudice, bias or other circum-

stances, unrelated to the questions of fact, which is to be decided by you.

IV.

Plaintiffs recovered a judgment against Roy Hooper in the sum of $5,334 in the Superior Court of San Mateo County. The execution thereon having been returned unsatisfied, plaintiffs now seek to recover on that judgment from the defendant. insurance company, insurers of the owner of the Buick automobile, which Hooper was driving at the time the plaintiff's husband was killed.

V.

Under the provisions of the policy, plaintiffs' claim to recovery is, first, that Hooper was driving the Buick car with the permission of the insured owner, and second, that the conditions of the policy with respect to suits were complied with.

VI.

The question as to whether or not Hooper had permission, expressed or implied, is a question of fact for you to determine, taking into consideration the fact of Hooper's employment by the owner of the car as chauffeur, and the evidence as to the circumstances under which he was driving the car on the Saturday when the injury giving rise to the accident occurred.

VII.

The testimony of one witness entitled to credence is sufficient in a civil case to prove a point in issue. Therefore, if you believe the testimony of the wit-

ness, Roy Hooper, it is sufficient to establish that the automobile was used with the permission, either expressed or implied, by its owner.

VIII.

You are instructed that if you should find that at the time of the said accident Roy Hooper was operating the Buick automobile [72] without the permission of Mary C. Kittredge, then your verdict must be against the plaintiffs and in favor of the defendant, the Indemnity Insurance Company of North America.

IX.

The insurance policy sued upon requires the insured to give the insurance company prompt notice of claims of suits arising out of an accident. The notice referred to may be given to the insurance company by any person connected with the suit or claim, and the giving of such notice is sufficient to bind the insurance company. If you find that the insurance company did receive reasonably prompt notice of the Superior Court action, of which we are concerned, and or the later service on Hooper from the plaintiffs herein, or their attorneys, then the requirements of the policy as to notice were satisfied. If you find that this requirement was not satisfied, the plaintiffs cannot recover.

Of the foregoing instructions so given by the Court, instruction number VII was proposed by plaintiffs; instructions numbers I, II and III were proposed by defendants, and instructions numbered

IV, V, VI, VIII and IX were given by the Court of its own motion.

Mr. BARATY.—The defendant excepts to the giving of instruction Number VII proposed by plaintiffs, on the grounds that that instruction is not warranted by the pleadings, inasmuch as there is no pleading alleging that permission was given to use the automobile.

The COURT.—And you do not object to the instruction given by the Court on the subject of notice.

Mr. BARATY.—No, I object to the instructions given by the Court generally.

The COURT.—In the Federal Court you have to specify the [73] particular instruction.

Mr. BARATY.—My objection is to any instruction given with reference to permission, that it is not within the issues pleaded.

The COURT.—As to that instruction, your exception is sufficient.

The jury may now retire and deliberate on your verdict.

After being instructed as aforesaid, the jury retired for deliberation, and thereafter, and on the 13th day of February, 1930, a verdict for the plaintiff in the sum of Fifty-three Hundred and Thirty-four Dollars ($5334.00), together with interest on the said sum from the 3d day of May, 1928, was given.

Within ten (10) days after the rendition of said verdict, and the entry of judgment therein, the defendant, Indemnity Insurance Company of North

America, duly served and filed its notice of intention to move for a new trial, which notice of intention and motion are in the words and figures as follows:

"In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 18,331—K.

BELVA FORREST and ROLAND CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY and RICHARD ROE CO., a Corporation,

Defendants.

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

NOTICE IS HEREBY GIVEN to you and to each of you that the defendant, Indemnity Insurance Company of North America, a [74] corporation, intends to move the above-entitled court

for an order vacating and setting aside the verdict of the jury herein on the 13th day of February, 1930, and the judgment entered thereon, and to grant a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.
2. That said verdict is against law.
3. Errors in law occurring at the trial and excepted to by said defendant.
4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.
5. Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial.
6. Orders of the Court by which said defendant was prevented from having a fair trial.
7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.
8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings on the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings

occurring at the trial herein as are within the recollection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America. [75]

MOTION OF DEFENDANT, INDEMNITY INSURANCE COMPAY OF NORTH AMERICA, FOR A NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and moves the above-entitled court for an order vacating and setting aside the verdict of the jury on the 13th day of February, 1930, and the judgment entered thereon, and granting a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by said defendant.

4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.

5. Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial.

6. Orders of the Court by which said defendant was prevented from having a fair trial.

7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.

8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings of the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings [76] occurring at the trial herein as are within the recollection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America."

That thereafter and on the 24th day of March, 1930, said motion for a new trial came on regularly for hearing and was argued, whereupon the Court, on March 29, 1930, made the following order, entered in the minutes of the court:

"Saturday, March 29, 1930.

Court met pursuant to adjournment.

Present: Hon. FRANK H. KERRIGAN, Judge.
Clerk (MORRIS).
Crier: ED DRYDEN.
Bailiff: SHELLEY INCH.

The COURT.—It is ordered that the motion for a new trial herein and heretofore submitted be, and the same is hereby denied."

Thereafter, and on the 2d day of April, 1930, the defendant, Indemnity Insurance Company of North America, a corporation, appeared in open court by its counsel, and noted its exception to the ruling of the Court denying its motion for a new trial herein, and said exception was allowed by the above-entitled court. [77]

DEFENDANT'S SPECIFICATION OF PARTICULARS WHEREIN THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT.

1. The evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that the automobile in question at the time of the accident mentioned in the complaint was being operated for the use or benefit or in the course of the business of the named assured, Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said automobile was

being used and operated by Roy Hooper, on his own independent pleasure.

2. The evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that at the time of the accident in question the said automobile was maintained, managed and operated by Roy Hooper, as chauffeur while in the course of his employment as chauffeur for said Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said automobile was being operated by said Roy Hooper on his own independent pleasure, and not in the course of his employment for the named assured, Mary C. Kittredge.

3. That the evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that at the time of the said accident the said Roy Hooper was operating the said Buick automobile with the permission of said Mary C. Kittredge, or with the permission of an adult member of the household of said named assured, other than a chauffeur or domestic servant, but, on the contrary, the evidence shows affirmatively that at the time of the said accident said automobile [78] was not being operated with the permission of the named assured, or any adult member of her household.

4. That the evidence was and is insufficient to justify the verdict or judgment in this: that there

was and is no evidence showing or tending to show and the evidence failed and fails to show that Roy Hooper forthwith after the receipt thereof forwarded to the defendant any process or pleading or paper relating to any claim or suit or proceeding concerning the accident alleged in the complaint, but, on the contrary, the said Roy Hooper wholly failed and neglected to forward to this defendant any process or pleading or paper of any kind relating to said or any suit or claim or proceeding, and wholly failed and neglected to forward to this defendant a copy of the summons and complaint, or to give to this defendant any notice of any service upon him of any summons and complaint in that certain action set forth and referred to in the complaint herein wherein the said Roy Hooper was defendant.

5. That the evidence was and is insufficient to justify the verdict or the judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that the said Roy Hooper at all times rendered to this defendant all co-operation and assistance in his power in the defense of said suit and action pending in the Superior Court of San Mateo County and set forth in the complaint on file herein, but, on the contrary, the evidence shows affirmatively that said Roy Hooper did not at any time or times or at all render to this defendant any co-operation or assistance whatsoever, as required by the terms of this defendant's policy.

6. That the verdict was and is against law in each and every of the particulars specified from 1 to 5 wherein it is alleged that the evidence was and is insufficient to justify the said verdict. [79]

DEFENDANT'S SPECIFICATIONS OF ERROR.

Defendant, Indemnity Insurance Company of North America, specifies the following errors at law occurring at the trial and excepted to by said defendant, and assigned and specified as error the following:

1. Insufficiency of the evidence to justify the verdict, as hereinabove set forth.

2. The Court erred in denying the motion of this defendant to strike out the following answer given by witness Roy Hooper on direct examination to the following question:

> "Q. What did she say to you?
>
> A. I asked her permission to go to the city Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse —whether it was Mrs. Kittredge's package being sent there or not,—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse."

3. The Court erred in overruling this defendant's objection to the following question asked of witness Hooper on redirect examination:

"Q. Had you ever driven either the Buick or Ford car of Mrs. Kittredge to San Francisco prior to the 8th day of August, 1926?"

4. The refusal of the Court to grant this defendant's motion for nonsuit.

5. The refusal of the Court to admit in evidence Defendant's Exhibit "C" for identification.

6. The Court erred in overruling this defendant's objection to the following question asked of witness Forsyth on cross-examination:

"Q. Mr. Forsyth, weren't you informed of the pendency of this suit and the service of this summons on Hooper by [80] Mr. Baraty, and the fact that he had been notified by Mr. Crawford and myself that this suit had been started and served on Hooper, and asking Mr. Baraty whether he wanted to appear on behalf of the company, and didn't Mr. Baraty communicate that to you?"

7. The Court erred in sustaining plaintiffs' objection to the following question asked of witness Brown on direct examination:

"Q. What did she say to you, if anything, concerning the accident that occurred on the 8th day of August, 1926?"

8. The Court erred in sustaining the objection of plaintiffs to the foregoing question asked of witness Brown on direct examination, after the death of Mary C. Kittredge had been established.

9. The Court erred in sustaining the plaintiffs'

objection to the following question asked of witness Brown, on direct examination:

> "Q. What did Mrs. Kittredge say to you—what did she say to you in the conversation held by yourself with her at her premises on the day of the accident, concerning the matter of her automobile, or whether she gave Roy Hooper permission to use the car, for her or for himself?"

10. The refusal of the Court to permit defendant to interrogate the jury as to whether any of them were acquainted with the plaintiff's present husband, when it appeared during the course of *of* the trial that the plaintiff had remarried, and that her new name was Belva Dovan.

11. The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford, on direct examination:

> "Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. [81] Gus L. Baraty, one of the attorneys in this case?"

12. The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford on direct examination:

> "Q. What was that conversation?"

13. The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford, on direct examination:

"Q. Was anything said about what the Indemnity Insurance Company of North America had said?"

14. Refusal of the Court to dismiss the jury and to declare a mistrial.

15. Refusal of the Court to grant this defendant's motion to exclude from evidence all hearsay testimony given on behalf of plaintiff.

16. The refusal of the Court to grant this defendant's motion for a directed verdict in favor of this defendant.

17. The refusal of the Court to give instructions requested by the defendant, as hereinbefore set forth.

18. The giving of instruction No. 7, proposed by plaintiffs, to which exception was taken by defendant, as hereinabove set forth.

19. The refusal of the Court to grant this defendant's motion for a new trial.

The foregoing constitutes all of the proceeding had, and all of the testimony taken, and evidence offered and received on the trial of said action, and all matters proved on said trial. Now, within the time required by law, and the rules of this Court, the said defendant, Indemnity Insurance Company of North America, a corporation, hereby proposes the foregoing as and for its bill of exceptions in this case, and prays that the same may be [82]

settled, allowed, signed, and certified as provided by law.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Defendant, Indemnity Insurance Company of North America, a Corporation.
[83]

STIPULATION TO FOREGOING AS THE BILL OF EXCEPTIONS IN THE ABOVE-ENTITLED ACTION AND TO THE CORRECTNESS OF SAME.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correctly engrossed, is true and correct, and that the same may be settled and allowed as the bill of exceptions of defendant, Indemnity Insurance Company of North America, on its appeal from the judgment in the above-entitled action.

Dated: May 10th, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.
HARTLEY F. PEART and
GUS L. BARATY,
Attorneys for Defendant Indemnity Insurance Company of North America.

ORDER SETTLING, CERTIFYING AND ALLOWING BILL OF EXCEPTIONS.

The attached and foregoing bill of exceptions, now being presented in due time, and found to be

correct, I do hereby certify that the said bill is a full, true and correct bill of exceptions in the above-entitled action, and that the recitals therein regarding the evidence are true and correct, and that the same is accordingly hereby approved, settled, certified and allowed.

Dated: May 12th, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed May 12, 1930. [84]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled matter, find a verdict in favor of plaintiffs, Belva Forrest and Ronald Claude Forrest, a minor, and against the defendant, Indemnity Insurance Company of North America, a corporation, for the sum of Five Thousand Three Hundred Thirty-four Dollars ($5,334.00), together with interest on said sum from the 3d day of May, 1928.

Dated: February 13, 1930.

JOHN T. ROBERTS,
Foreman.

[Endorsed]: Filed Feb. 13, 1930, at 12:25 P. M. [85]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,331—K.

BELVA FORREST and ROLAND CLAUDE FORREST, a Minor, by BELVA FORREST, His Guardian ad Litem,

Plaintiffs,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation, JOHN DOE COMPANY, and RICHARD ROE CO., a Corporation,

Defendants.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 12th day of February, 1930, being a day in the November, 1929, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Joseph A. Brown, Esquire, appearing as attorney for plaintiffs, and Hartley F. Peart, Esquire, appearing as attorney for defendants, and the trial having been proceeded with on the 13th day of February, in said year and term, and oral and documentary evidence on behalf of the respective parties, having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subse-

quently rendered the following verdict, which was ordered recorded, namely: "We, the jury in the above-entitled matter, find a verdict in favor of plaintiffs, Belva Forrest and Ronald Claude Forrest, a minor, and against the defendant, Indemnity Insurance Company of North America, a corporation, for the sum of Five Thousand Three Hundred Thirty-four Dollars ($5,334.00), together with interest on said sum from the 3d day of May, 1928. Dated: February 13, 1930. John T. Roberts, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Belva Forrest and Ronald Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* plaintiffs, do have and recover of and from Indemnity Insurance Company of North America, a corporation, defendant, the sum of Five Thousand Nine Hundred Ninety-seven and 78/100 (5,997.78) Dollars, together with their costs herein expended taxed at $171.58.

Judgment entered this 13th day of February, 1930.

WALTER B. MALING,
Clerk. [86]

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

NOTICE IS HEREBY GIVEN to you and to each of you that the defendant, Indemnity Insurance Company of North America, a corporation, intends to move the above-entitled court for an order vacating and setting aside the verdict of the jury herein on the 13th day of February, 1930, and the judgment entered thereon, and to grant a new trial at the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by said defendant.

4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.

5. Irregularity in the proceedings of the Court by which [87] said defendant was prevented from having a fair trial.

6. Orders of the Court by which said defendant was prevented from having a fair trial.

7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.

8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings on the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings occurring at the trial herein as are within the recollection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America.

MOTION OF DEFENDANT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, FOR A NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof, and to the Above-named Plaintiffs and to Messrs. Joseph A. Brown and A. L. Crawford, Their Attorneys:

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and moves the above-entitled court for an order vacating

and setting aside the verdict of the jury [88] herein on the 13th day of February, 1930, and the judgment entered thereon, and granting a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.
2. That said verdict is against law.
3. Errors in law occurring at the trial and excepted to by said defendant.
4. Irregularity in the proceedings of the plaintiffs by which said defendant was prevented from having a fair trial.
5. Irregularity in the proceedings of the Court by which said defendant was prevented from having a fair trial.
6. Orders of the Court by which said defendant was prevented from having a fair trial.
7. Abuse of discretion by the Court by which said defendant was prevented from having a fair trial.
8. Accident or surprise which ordinary prudence could not have guarded against.

Said motion will be made and based upon this notice, upon each and every of the grounds hereinabove set forth; upon all of the pleadings, papers, files, records and orders of the Court on file herein; upon the documentary evidence offered at the trial herein; upon the report of the proceedings on the trial herein taken by the phonographic reporter or to a certified transcript of said report; upon the minutes of the court; upon such proceedings occurring at the trial herein as are within the recol-

lection of the judge herein; upon affidavits to be prepared, filed and served upon you.

Dated: February 21, 1930.

HARTLEY F. PEART and
GUS L. BARATY,

Attorneys for Defendant, Indemnity Insurance Company of North America.

Receipt of a copy of the within notice of intention to move for new trial and motion of defendant Indemnity Insurance Company of North America, for a new trial, is hereby admitted this 21 day of February, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 21, 1930. [89]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 29th day of March, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—MARCH 29, 1930—ORDER DENYING MOTION FOR NEW TRIAL.

Ordered that the motion for a new trial heretofore submitted be and the same is hereby denied. [90]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable FRANK H. KERRIGAN, Judge of the United States District Court:

The above-named defendant, Indemnity Insurance Company of North America, a corporation, feeling aggrieved by the verdict rendered in this court on the 13th day of February, 1930, and the judgment entered therein on the 13th day of February, 1930, in favor of the plaintiffs above named, which judgment was in the sum of $5,334.00, together with interest on said sum from the 3d day of May, 1928, together with costs, does hereby appeal from the said judgment and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set forth in the assignment of errors filed herewith, and said Indemnity Insurance Company of North America, a corporation, prays that its plea be allowed and that citation be

issued as provided by law, and that a transcript of the record, proceedings and documents upon which judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals [91] for the Ninth Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that all further proceedings be suspended, stayed and superseded until the termination of said appeal by said United States Circuit Court of Appeals, and that the proper order relating to and fixing the amount of security to be required of it be made.

And your petitioner will ever pray, etc.

Dated: San Francisco, California, April 7, 1930.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Defendant.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Said Defendant.

Receipt of copy of the within petition for appeal is hereby admitted this 11 day of April, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 11, 1930. [92]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant, Indemnity Insurance Company of North America, a corporation, and contends that in the record, verdict, decision, final judgment and orders in said cause, there has been manifest and material error and in connection herewith, and as part of its appeal herein, makes and files the following assignment of error on which it will rely in the prosecution of its appeal in said cause:

I.

The Court erred in refusing each of the following instructions, which were requested by this defendant:

1. The evidence produced on the part of plaintiffs must be of greater weight, quality and convincing effect than that produced by the defendant. If, therefore, you find that the evidence produced by the plaintiffs and the evidence produced by the defendant Indemnity Insurance Company of North America is equally balanced, both in weight, quality and convincing effect, I instruct you that the plaintiffs have failed to prove the allegations of their complaint by the preponderance of the evidence. In that event, if you so find, your verdict must be against the plaintiffs and in favor of the defendant, Indemnity Insurance Company of North America. [93]

2. You are instructed that if you should find that at the time of the said accident the said Roy Hooper was operating the said Buick automobile without the permission of said Mary C. Kittredge and was not operating the said automobile on the business or for or on behalf of said Mary C. Kittredge, then your verdict must be against the plaintiffs and in favor of defendant, Indemnity Insurance Company of North America.

3. You are instructed that if you should find that said Roy Hooper failed within a reasonable time after the receipt of same to deliver to defendant any pleading or paper of any kind relating to any claim, suit or proceeding arising out of said accident, that your verdict shall be against plaintiffs, and in favor of defendant, Indemnity Insurance Company of North America.

4. You are instructed that if you should find that in the action brought by plaintiff herein against said Roy Hooper, and in which judgment was recovered in favor of plaintiffs and against said Roy Hooper, that said Roy Hooper failed to render to the Indemnity Insurance Company of North America, all co-operation and assistance in his power in the defense of said action, then your verdict shall be against the plaintiffs herein and in favor of defendant, Indemnity Insurance Company of North America.

II.

The evidence was insufficient to justify the verdict in the following particulars:

1. The evidence was and is insufficient to justify

the verdict or judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show that the automobile in question at the time of the accident mentioned in the complaint was being operated for the use or benefit or in the course of the business of the named assured, Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said [94] automobile was being used and operated by Roy Hooper, on his own independent pleasure.

2. The evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show, that at the time of the accident in question the said automobile was maintained, managed and operated by Roy Hooper, as chauffeur while in the course of his employment as chauffeur for said Mary C. Kittredge, but, on the contrary, the evidence shows affirmatively that at the time of the said accident the said automobile was being operated by said Roy Hooper on his own independent pleasure, and not in the course of his employment for the named assured, Mary C. Kittredge.

3. That the evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show, that at the time of the said accident the said Roy Hooper was operating the said Buick automobile with the permission of said Mary C. Kittredge, or with the per-

mission of an adult member of the household of said named assured, other than a chauffeur or domestic servant, but, on the contrary, the evidence shows affirmatively that at the time of the said accident said automobile was not being operated with the permission of the named assured, or any adult member of her household.

4. That the evidence was and is insufficient to justify the verdict or judgment in this: that there was and is no evidence showing or tending to show and the evidence failed and fails to show that Roy Hooper forthwith after the receipt thereof forwarded to the defendant any process or pleading or paper relating to any claim or suit or proceeding concerning the accident alleged in the complaint, but, on the contrary, the said Roy Hooper wholly failed and neglected to forward to this defendant any process [95] or pleading or paper of any kind relating to said or any suit or claim or proceeding, and wholly failed and neglected to forward to this defendant a copy of the summons and complaint, or to give to this defendant any notice of any service upon him of any summons and complaint in that certain action set forth and referred to in the complaint herein wherein the said Roy Hooper was defendant.

5. That the evidence was and is insufficient to justify the verdict or the judgment in this: that there was and is no evidence showing or tending to show, and the evidence failed and fails to show, that the said Roy Hooper at all times rendered to this defendant all co-operation and assistance in his

power in the defense of said suit and action pending in the Superior Court of San Mateo County, and set forth in the complaint on file herein, but, on the contrary, the evidence shows affirmatively that said Roy Hooper did not at any time or times or at all render to this defendant any co-operation or assistance whatsoever, as required by the terms of this defendant's policy.

III.

The Court erred in denying the motion of this defendant to strike out the following answer by witness Roy Hooper on direct examination to the following question:

"Q. What did she say to you?

A. I asked her permission to go to the City Saturday afternoon at 4:30, and in so doing, I delivered a package handed to me by the nurse—whether it was Mrs. Kittredge's package being sent there or not—the nurse handed it to me, and I delivered it to the Fairmont Hotel, and I can't say whether it was from Mrs. Kittredge or the nurse."

IV.

The Court erred in overruling this defendant's objection to the following question asked of the witness Hooper [96] on redirect examination:

"Had you ever driven either the Buick or Ford car of Mrs. Kittredge to San Francisco prior to the 8th day of August, 1926?"

V.

The Court erred in overruling this defendant's

objection to the following question asked of witness Forsyth:

> "Q. Mr. Forsyth, weren't you informed of the pendency of this suit, and the service of this summons on Hooper by Mr. Baraty, and the fact that he had been notified by Mr. Crawford and myself that this suit had been started and served on Hooper, and asking Mr. Baraty whether he wanted to appear on behalf of the company, and didn't Mr. Baraty communicate that to you?"

VI.

The Court erred in sustaining plaintiff's objection to the following question asked of witness Brown on direct examination:

> "What did she say to you, if anything, concerning the accident that occurred on the 8th day of August, 1926?"

VII.

The Court erred in sustaining the objection of plaintiffs to the last above mentioned question addressed to witness Brown on direct examination, after the death of Mary C. Kittredge had been established.

VIII.

The Court erred in sustaining the plaintiff's objection to the following question asked of witness Brown on direct examination:

> "Q. What did Mrs. Kittredge say to you,—what did she say to you in the conversation

held by yourself with her at her premises on the day of the accident, concerning the matter of her automobile, or whether she gave Roy Hooper permission to use the car, for her or for himself?" [97]

IX.

The Court erred in overruling the objection of this defendant to the following question addressed to witness Crawford on direct examination:

"Q. Did you have any conversation within three or four days after the service of summons on Roy Hooper, with Mr. Gus L. Baraty, one of the attorneys in this case?"

X.

The Court erred in overruling the objection of this defendant to the following question of witness Crawford on direct examination.

"Q. What was that conversation?"

XI.

The Court erred in overruling the objection of this defendant to the following question asked of witness Crawford, on direct examination.

"Q. Was anything said about what the Indemnity Insurance Company of North America had said?"

XII.

1. The Court erred in refusing to grant this defendant's motion for nonsuit.

2. The Court erred in refusing to admit in evidence Defendant's Exhibit "C" for Identification.

3. The Court erred in refusing to dismiss the jury and to declare a mistrial.

4. The Court erred in refusing to grant this defendant's motion to exclude from evidence all hearsay testimony given on behalf of plaintiff.

5. The Court erred in refusing to grant this defendant's motion for a directed verdict. [98]

6. The Court erred in refusing to grant this defendant's motion for a new trial.

XIII.

That the judgment is contrary to law.

WHEREFORE, said defendant, Indemnity Insurance Company of North America, prays that the said judgment of the District Court of the United States may be reversed and held for naught.

Dated: April 7, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Defendant, Indemnity Insurance Company of North America.

Receipt of a copy of the within assignment of errors is hereby admitted this 11th day of April, 1930.

JOS. A. BROWN,
A. L. CRAWFORD,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 11, 1930. [99]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of Hartley F. Peart and Gus. L. Baraty, attorneys for the above-named petitioner, and defendant, Indemnity Insurance Company of North America, a corporation, and upon filing the petition of said defendant for appeal,—

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein on the 13th day of February, 1930, in favor of plaintiffs and against said defendant, and that the amount of the bond as required by law on said appeal be and the same is hereby fixed at $7,500.00, and said bond shall act as a supersedeas and cost bond, and execution shall be stayed pending the outcome of said appeal.

Dated: April 11th, 1930.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed April 11, 1930. [100]

[Title of Court and Cause.]

BOND ON APPEAL.

The rate of premium charged on this bond is $10 per thousand; the total of premium charged is $75.

KNOW ALL MEN BY THESE PRESENTS: That we, Indemnity Insurance Company of North

America, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to transact business and issue surety bonds in the State of California, as surety, are held and firmly bound unto Belva Forrest and Roland Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* plaintiffs in the above-entitled action, in the sum of Seventy-five Hundred (7500.00) Dollars, to be paid to the said Belva Forrest and Roland Claude Forrest, a minor, their executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this 12th day of April, 1930.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court between Belva Forrest and Roland Claude [101] Forrest, a minor, by Belva Forrest, his guardian *ad litem,* plaintiffs, and Indemnity Insurance Company of North America, a corporation, defendant, a judgment was rendered against said defendant on the 13th day of February, 1930, for the sum of Five Thousand Three Hundred Thirty-four (5,334.00) Dollars, together with interest on said sum from the 3d day of May, 1928, and together with costs; and

WHEREAS, said defendant, Indemnity Insurance Company of North America, a corporation, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to said Belva Forrest and Roland Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty (30) days from the date of said citation,—

NOW, THEREFORE, the condition of this obligation is such that, if the said defendant, Indemnity Insurance Company of North America, a corporation, shall prosecute its said appeal to effect and satisfy the judgment against it and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; otherwise to remain in full force and effect.

And further the undersigned surety agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the undersigned Fidelity and Deposit Company of Maryland of not less than ten (10) days, proceed summarily in the above-entitled cause to ascertain the amount which said Fidelity and Deposit Company of Maryland is bound to pay on account of such breach and render judgment therefor against it and award

execution thereof, not exceeding, however, the sum specified in this [102] undertaking.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Corporation,
Principal.
By A. W. FORSYTH.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Surety.
By JOHN W. LATHAM,
Attorney-in-fact.
Attest: C. A. BEVANS,
Agent.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: April 12, 1930.

FRANK H. KERRIGAN,
United States District Judge. [103]

State of California,
City and County of San Francisco,—ss.

On the twelfth day of April, A. D. 1930, before me, John McCallan, a notary public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared, John W. Latham, attorney-in-fact, and C. A. Bevans, agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation, therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose

names are subscribed to the within instrument as attorney-in-fact and agent respectively of said corporation and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as attorney-in-fact and agent respectively.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] JOHN McCALLAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 12, 1930. [104]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

The defendant, Indemnity Insurance Company of North America, a corporation, respectfully requests that you prepare record on appeal in the above-entitled cause, and include therein the following:

1. Complaint of plaintiffs.
2. Demurrer of this defendant.
3. Order overruling demurrer to complaint.
4. Answer of this defendant.
5. Amended answer of this defendant.
6. Order denying motion for nonsuit.

7. Order denying defendant's motion for directed verdict.
8. Verdict of jury rendered February 13, 1930.
9. Judgment on the verdict entered February 13, 1930.
10. Defendant's notice of intention to move for a new trial and its motion therefor.
11. Order denying motion for a new trial.
12. Bill of exceptions.
13. Petition for appeal. [105]
14. Citation on appeal.
15. Assignment of errors.
16. Order allowing appeal.
17. Bond on appeal.
18. This praecipe.

Dated: April 12, 1930.

HARTLEY F. PEART,
GUS L. BARATY,
Attorneys for Said Defendant.

Received copy May 8, 1930.

JOS. A. BROWN.

[Endorsed]: Filed May 12, 1930. [106]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California do hereby, certify the foregoing 106 pages, numbered from 1 to 106, inclusive, to be a full, true and correct copy of the record and pro-

ceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $36.40; that the said amount was paid by the appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 10th day of June, A. D. 1930.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [107]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to Belva Forrest and Ronald Claude Forrest, a Minor, by Belva Forrest, His Guardian *ad Litem,* and Joseph A. Brown, Esq., and A. L. Crawford, Esq., Their Attorneys, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof,

pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Belva Forrest and Ronald Claude Forrest, a minor, by Belva Forrest, his guardian *ad litem,* were plaintiffs, and Indemnity Insurance Company of North America, a corporation, was defendant, and wherein Indemnity Insurance Company of North America, a corporation is appellant and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, Southern Division, this 12 day of April, A. D. 1930.

FRANK H. KERRIGAN,
United States District Judge.

Due service and receipt of a copy of the within citation is hereby admitted this 14th day of April, 1930.

J. A. BROWN,
A. L. CRAWFORD,
Attorneys for Appellees.

Filed Apr. 14, 1930. [108]

[Endorsed]: No. 6165. United States Circuit Court of Appeals for the Ninth Circuit. Indemnity Insurance Company of North America, a Corporation, Appellant, vs. Belva Forrest and Ronald Claude Forrest, a Minor, by Belva Forrest, His Guardian *ad Litem,* Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 11, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.